260 N.C. App.—No. 4 **Pages 459-708**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 7, 2020

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
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COURT OF APPEALS

CASES REPORTED

FILED 7 AUGUST 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

children with their parents should cease, where the trial court's order did not demonstrate what evidence convinced the court that the parents had made minimal progress toward reunification and the evidence was a mixed bag. **In re I.K., 547.**

CHILD CUSTODY AND SUPPORT

Custody—modification—standard—The trial court applied the proper child custody modification standard where the father argued that a temporary order had converted to a permanent order by the operation of time. The relevant time period ends when a party requests that the matter be set for hearing, not when the hearing is held. Here, only nine months elapsed between the entry of the temporary order and the request to set the matter for a hearing, and the matter had not lain dormant. **Eddington v. Lamb, 526.**

Decision-making authority—health care—education—The portion of a child custody award granting the mother the final decision-making authority for the child's health care and education was vacated and remanded where the findings were not sufficient to support such a broad abrogation of the father's final decision-making authority. **Eddington v. Lamb, 526.**

Physical custody—sufficiency of findings—The trial court did not abuse its discretion by awarding primary physical custody of a child to the mother and secondary physical custody to the father where the unchallenged findings were adequate for meaningful appellate review and were sufficient to support the trial court's determination. Those findings compared the parents' home environments, mental and behavioral fitness, work schedules as they related to their abilities to care for the child, and past decision-making with respect to the child's care. **Eddington v. Lamb, 526.**

CONSTITUTIONAL LAW

Confrontation Clause—cross-examination of witness—pending unrelated charges—In a prosecution for first-degree murder and related crimes, the trial court erred in limiting defendant's cross-examination of the State's principal witness regarding possible bias where the witness had pending drug charges in another county and defendant produced evidence of an email exchange between prosecutors which he argued established a possible reduction of those charges in exchange for her testimony against him. **State v. Bowman, 609.**

Confrontation Clause—error in limiting cross-examination—prejudice—The trial court's constitutional error in prohibiting a defendant in a first-degree murder trial from cross-examining a witness about possible bias arising from her pending drug charges was prejudicial and required a new trial. The error was not harmless where the witness was the State's principal eyewitness and the State's other evidence against defendant was tenuous, making her testimony essential. **State v. Bowman, 609.**

Cruel and unusual punishment—juvenile—life imprisonment without parole—mitigating factors—The sentence of life imprisonment without parole did not violate the Eighth Amendment rights of defendant, who was seventeen and one-half years old at the time he committed the murder, where the trial court complied with the statutory requirements of N.C.G.S. § 15A-1340.19 *et seq.* by conducting a hearing and considering mitigating factors. **State v. Sims, 665.**

now-bankrupt ownership company to swap parts between airplanes to maximize the efficiency of the program. Defendants made no showing that the removal of the engines from their airplane and installation on plaintiffs' airplane resulted from anything other than the implementation of the ownership program. **Press v. AGC Aviation, LLC, 556.**

CRIMINAL LAW

Jury instructions—requested instruction—justification defense—The trial court erred by denying defendant's request for a jury instruction on justification as a defense to possession of a firearm by a felon where he satisfied each element of the justification defense as set forth in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). In the light most favorable to defendant, the evidence showed that another family approached defendant's family's home seeking a fight; defendant grabbed his cousin's gun only after he heard the other family's guns cocking and witnessed his cousin struggling with his own gun; defendant had tried to calm the situation without violence; and defendant relinquished possession of the gun when he was able to run away from the situation. Furthermore, defendant showed he was prejudiced by this error, as the jury was instructed on self-defense with regard to defendant's assault charges and acquitted him of those charges, and the jury sent the trial court a note asking for clarification as to whether there existed a justification defense for possession of a firearm by a felon. **State v. Mercer, 649.**

DIVORCE

Equitable distribution—business valuation—appreciation—active versus passive—Although any increase in value of separate property during a marriage is presumed to be marital property, the trial court in an equitable distribution action did not err in designating half the appreciation in value of a husband's partnership during the marriage as passive, and thus the husband's separate property, based on evidence that adequately rebutted that presumption. Sufficient evidence was presented to support the trial court's reasoned calculation that part of the appreciation in value was attributed to efforts by the husband's father and to changes in market conditions. **Blair v. Blair, 474.**

Equitable distribution—business valuation—unchallenged findings—In an equitable distribution action, a wife's challenges to the trial court's valuation of her husband's business at the date of their separation were overruled where the trial court's unchallenged findings of fact were supported by the evidence. **Blair v. Blair, 474.**

Equitable distribution—marital property—529 Savings Plans—The Court of Appeals, considering the issue for the first time, affirmed the trial court's equitable distribution order classifying funds in a 529 Savings Plan, which a married couple created during their marriage for their children's education expenses, as marital property pursuant to N.C.G.S. § 50-20(b)(1). The parents retained ownership and control over the 529 funds and were under no obligation to spend the money on educational expenses. **Berens v. Berens, 467.**

Equitable distribution—partnership percentages—evidentiary support—In an equitable distribution action, the trial court's findings of fact and conclusions of law that a husband's percentage of a partnership with his father was fifty percent were based on sufficient evidence, despite tax returns that said otherwise; it is

SENTENCING—Continued

Multiple charges for same conduct—conviction with lesser punishment vacated—Defendant's convictions for assault with a deadly weapon and assault on a child, both stemming from the shooting of a gun toward a minor in the back seat of a car, could not both stand; pursuant to N.C.G.S. § 14-33, the conviction for assault on a child was vacated because N.C.G.S. § 14-32 provided harsher punishment for the same conduct—assault with a deadly weapon. **State v. Perry, 659.**

Restitution—medical expenses—sufficiency of evidence—The trial court erred in ordering defendant to pay restitution for a victim's medical expenses incurred as a result of being assaulted, where the amount was not supported by sufficient testimony or documentary evidence. **State v. Buchanan, 616.**

SEXUAL OFFENSES

By a person in a parental role—sexual act—The State presented sufficient evidence to convict defendant of sex offenses against his 16-year-old stepdaughter. The testimony of an officer recounting defendant's confession, in which he stated he put his hands "in" his stepdaughter's genital area, would allow a rational juror to conclude that defendant engaged in the sexual act of digital penetration of his stepdaughter in violation of N.C.G.S. § 14-27.7. **State v. Wilson, 698.**

Opinion testimony—female anatomy—plain error review—The trial court did not plainly err in a prosecution for sex offenses by allowing an officer to give his "opinion" concerning the female anatomy and his inference that digital penetration occurred. Absent this testimony, there was sufficient other evidence of penetration. **State v. Wilson, 698.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

AVR DAVIS RALEIGH, LLC, PLAINTIFF
v.
TRIANGLE CONSTRUCTION COMPANY, INC., DEFENDANT

No. COA17-958

Filed 7 August 2018

1. Appeal and Error—interlocutory appeal—arbitration—substantial right

The denial of a demand for arbitration, while interlocutory, affects a substantial right and is immediately appealable.

2. Arbitration and Mediation—agreement to arbitrate—amount of dispute

The trial court erred by agreeing with plaintiff's interpretation of an arbitration clause where there was a $500,000 threshold but the parties disagreed on handling multiple claims. When faced with doubts concerning the scope of arbitrable issues, the trial court should have deferred to North Carolina's strong policy favoring arbitration.

Judge MURPHY concurring.

Appeal by defendant from order entered 22 February 2017 by Judge W. David Lee in Wake County Superior Court. Heard in the Court of Appeals 5 March 2018.

Wyche, P.A., by William M. Wilson, III, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, Bradley M. Risinger, and Robert A. deHoll, for defendant-appellant.

CALABRIA, Judge.

Triangle Construction Company, Inc. ("defendant") appeals from an order denying its motion to dismiss and to compel arbitration. After careful review, we reverse the trial court's order and remand for entry of an order compelling arbitration.

I. Factual and Procedural Background

In 2013, AVR Davis Raleigh, LLC ("plaintiff") hired defendant to construct a multi-building apartment complex on land owned by plaintiff in Raleigh, North Carolina. On 31 October 2013, the parties entered into a

contract for defendant to construct three buildings containing 243 apartments, at a guaranteed maximum price of $22,506,113.27. Defendant agreed to achieve substantial completion of the project within 420 days of commencement, with the timeline subject to adjustment as provided by the contract.

On 8 June 2016, plaintiff filed a complaint against defendant in Wake County Superior Court, alleging, *inter alia*, that defendant had failed to adhere to the contractual timeline and failed to pay subcontractors, resulting in substantial damages to plaintiff. Plaintiff asserted claims for breach of contract and breach of agreement to defend and indemnify, and sought $2,708,254.96 in damages. Defendant subsequently filed an answer asserting multiple affirmative defenses and counterclaims for breach of contract, foreclosure of a mechanic's lien, quantum meruit, unjust enrichment, and unfair and deceptive trade practices. Defendant alleged, *inter alia*, that plaintiff had failed to approve and pay for 112 changes to the scope of work under the contract, which caused project delays and approximately $2 million in total damages to defendant. In addition to its damages for the 112 change orders, defendant also sought $159,381.00 for unpaid payment applications and $1,125,306.00 for unpaid retainage.

On 27 July 2016, defendant filed notice of removal to the United States District Court for the Eastern District of North Carolina. The following day, defendant filed a motion to dismiss plaintiff's complaint and to compel arbitration. Defendant asserted that all of the parties' claims must be arbitrated, pursuant to a clause in the contract providing for the following method of binding dispute resolution:

> Arbitration of claims under $500,000 with litigation of claims over $500,000. In the event there are several claims under $500,000, but the aggregate of all claims exceeds $500,000, all the claims shall be arbitrated.

Due to a lack of diversity jurisdiction, on 1 September 2016, the United States District Court entered an order remanding the case to Wake County Superior Court. On 19 October 2016, defendant filed a motion in Wake County Superior Court, as above, seeking to dismiss plaintiff's complaint and to compel arbitration.

Following a hearing, on 22 February 2017, the trial court entered an order denying defendant's motion to dismiss and to compel arbitration. The trial court found that, "in its quest to meet the jurisdictional threshold necessary to compel arbitration," defendant had split its demand for damages for breach of contract by characterizing the 112 change

orders as 112 separate claims. However, the trial court determined that separating "each item or segment of labor and/or materials that may have exceeded the original scope of the work into multiple evidentiary components . . . would require the court to construe the contract in an awkward, contrived and unreasonable manner." The trial court further found that the parties' dispute resolution provision "simply did not address the particular facts and circumstances" of the instant case:

> The hybrid language can be construed to only address three possibilities: (1) Claims under $500,000.00 (arbitration); (2) claims over $500,000.00 (litigation); and (3) several claims under $500,000.00 but which in the aggregate exceed $500,000.00 (arbitration). It is reasonable to conclude that the language used does not address the circumstances of the present case where there are **both** (1) claims which, indisputably, exceed $500,000.00, *and* (2) several claims which, arguably at best, are under $500,000.00 but which in the aggregate exceed $500,000.00.

The trial court therefore denied defendant's motion to dismiss and to compel arbitration, concluding that "the parties have not selected a method of binding dispute resolution other than litigation so that the claims must, both as a matter of law and in accordance with the written agreement be resolved in a court of competent jurisdiction."

Defendant appeals.

II. Motion to Compel Arbitration

On appeal, defendant contends that the trial court erred in denying its motion to dismiss and to compel arbitration. We agree.

A. Interlocutory Appeal

[1] As an initial matter, we note that although the trial court's order is interlocutory, "the denial of a demand for arbitration is an order that affects a substantial right which might be lost if appeal is delayed, and thus is immediately appealable." *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 1-567.67(a)(1) (2017) (providing that an appeal may be taken from "[a]n order denying an application to compel arbitration"). Accordingly, defendant's appeal is properly before this Court.

B. Discussion

[2] "North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Our strong public policy requires that the courts

resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). "This is true whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* (citations and quotation marks omitted).

"[B]efore a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate." *Raspet*, 147 N.C. App. at 135, 554 S.E.2d at 678. Whether a dispute is subject to arbitration is a question of contract interpretation to be answered by the trial court. *Id.* at 136, 554 S.E.2d at 678. "[A] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law," which we review *de novo* on appeal. *Id.* To determine whether a dispute is subject to arbitration, the trial court must engage in a two-pronged analysis to ascertain "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Id.* (citation and quotation marks omitted). It is the second step of the trial court's inquiry "where the presumption in favor of arbitration exists." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 479, 583 S.E.2d 325, 331 (2003).

In the instant case, the first of these questions is answered by the plain language of the binding dispute resolution provision in the parties' modified form contract. Section 13.2 states:

> § 13.2 BINDING DISPUTE RESOLUTION
>
> For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201 – 2007, the method of binding dispute resolution shall be as follows:
>
> *(Check the appropriate box: If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction:)*
>
> [ ] Arbitration pursuant to Section 15.4 of AIA Document A201 – 2007
>
> [ ] Litigation in a court of competent jurisdiction
>
> [X] Other *(Specify)*

> Arbitration of claims under $500,000 with litigation of claims over $500,000. In the event there are several claims under $500,000, but the aggregate of all claims exceeds $500,000, all the claims shall be arbitrated.

The first sentence of the binding dispute resolution provision clearly demonstrates that the parties agreed to arbitrate "claims under $500,000." Admittedly, the second sentence is far less clear. Nevertheless, since the parties had a valid agreement to arbitrate, the dispositive issue is whether the instant "dispute falls within the substantive scope of that agreement." *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (citation and quotation marks omitted). Indeed, "the problem at hand is the construction of the contract language itself . . . ." *Johnston Cty.*, 331 N.C. at 91, 414 S.E.2d at 32.

Unsurprisingly, the parties disagree over the proper interpretation of the binding dispute resolution provision. At the hearing on defendant's motion to dismiss and to compel arbitration, plaintiff argued that there is a $500,000 "threshold . . . [o]ver that we're litigating; under that, we're arbitrating." According to plaintiff, the provision requires "litigation of all claims when at least one claim exceeds $500,000 and provides for arbitration when no single claim exceeds $500,000 (regardless of the total)." By contrast, defendant interprets the provision to mean that whenever there are several claims that are worth less than $500,000 individually, but more than $500,000 in the aggregate, then all of the claims must be *arbitrated*.

The trial court agreed with plaintiff's interpretation, and accordingly denied defendant's motion. This decision was in error.

In its order, the trial court recognized the "ambiguities" created by the "inartfully drafted dispute resolution language[.]" We agree that there are several reasonable interpretations of the provision, including those favored by both parties. However, faced with such "doubts concerning the scope of arbitrable issues," the trial court should have deferred to North Carolina's strong policy favoring arbitration. *Id.* Instead, the court erroneously concluded "that the parties have not selected a method of binding dispute resolution other than litigation" and denied defendant's motion to dismiss and to compel arbitration. Accordingly, we reverse the trial court's order and remand for entry of an order compelling arbitration. *See, e.g.*, *Ellison v. Alexander*, 207 N.C. App. 401, 415, 700 S.E.2d 102, 112 (2010).

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

While I concur in the Majority's opinion based on the current status of our caselaw, I write separately to emphasize the importance of the right to a jury trial in civil proceedings under the North Carolina Constitution. "[A] frequent Recurrence to fundamental Principles is absolutely necessary to preserve the Blessings of Liberty." N.C. Const. of 1776, Declaration of Rights, § 21. A recurrence of our fundamental principles is needed here.

Each iteration of our Constitution has explicitly guaranteed the right to a jury trial for civil cases respecting property:

> "That in all controversies at Law respecting Property, the ancient Mode of Trial by Jury is one of the best Securities of the Rights of the People, and ought to remain sacred and inviolable." N.C. Const. of 1776, Declaration of Rights, § 14.
>
> "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." N.C. Const. of 1868, art. I, § 19.
>
> "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. of 1971, art. I, § 25.

The 1868 Constitution merged actions at law and in equity, such that this right to a jury trial now applies to all civil claims, provided that the case respects property. N.C. Const. of 1868, art. IV, § 1. *See also Kiser v. Kiser*, 325 N.C. 502, 506-07, 385 S.E.2d 487, 489 (1989) ("[T]his section created no additional substantive rights to trial by jury in all civil cases, but rather assured that the jury trial rights substantively guaranteed by article I, section 19 (now article I, section 25) would apply equally to questions of fact arising in cases brought in equity as well as cases brought at law.").

Since the adoption of our first Constitution in 1776, our courts have repeatedly pronounced the importance of the right to a jury trial.

"[W]e have a principle of our organic law, by which it is declared that the trial by jury is an institution which has been, and must be, cherished by every free people, as the best security for their lives and property, and ought to remain 'sacred and inviolable.' " *State v. Allen*, 48 N.C. 257, 262 (1855). Our Constitution thus guarantees this right to all those in North Carolina, albeit only under certain circumstances. "The right to trial by jury under article I has long been interpreted by this Court to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted." *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490. We have enforced this condition because the changes made by the 1971 Constitution did not alter the substantive rights guaranteed in the 1868 Constitution. There was a "clear intent on the part of the framers of the new document merely to update, modernize and revise editorially the 1868 Constitution." *N.C. State Bar v. DuMont*, 304 N.C. 627, 636, 286 S.E.2d 89, 95 (1982). This lack of substantive change to the jury trial provision does not show that "the framers of the 1970 Constitution intended that instrument to enlarge upon the rights granted by the 1868 Constitution . . . . [S]uch an intent shows that the 1970 framers intended to preserve intact all rights under the 1868 Constitution." *Id.* The provision's deep roots in our state's history and the unwavering intent of the People to protect this right demonstrate that "section 25 of our Declaration of Rights is one of the 'great ordinances of the Constitution.' " *Kiser*, 325 N.C. at 509, 385 S.E.2d at 491 (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209, 48 S. Ct. 480, 485 (1928) (Holmes, J., dissenting)).

Therefore, while I recognize that our appellate courts and General Assembly have expressed a strong policy in favor of arbitration, the policy of the People of this state as expressed in our Constitution is for jury trials:

> The right to a jury trial is a substantial right of great significance. "It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case . . . . Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver."

Mathias v. Brumsey, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975) (quoting *In re Gilliland*, 248 N.C. 517, 522, 103 S.E.2d 807, 811 (1958)). The People have valued the sacred right to a jury trial since the adoption

of our first state Constitution in 1776 and prioritized it over variations in civil proceedings:

> Our [C]onstitution declares that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable . . . . [A]ny innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end endanger or pervert this excellent institution from its usual course.

Whitehurt v. Davis, 3 N.C. 113, 113 (1800). Indeed, the constitutional right to a trial by jury was the basis of one of the first challenges to the validity of a North Carolina statute. *See Bayard v. Singleton*, 1 N.C. 5, 5 (1787) (invalidating a statute that required cases be dismissed when a defendant could prove that he bought the property at issue from a commissioner of forfeited estates).

In light of the historical significance of this right to a jury trial, I stress that, although "North Carolina has a strong public policy favoring the settlement of disputes by arbitration[,]" we cannot abandon our constitutional rights in favor of procedural efficiency and convenience. *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992).

As the Majority observes, "there are several reasonable interpretations of the provision [at issue]," and a consideration of the People's policy as expressed in our Constitution should dictate that the provision be interpreted in favor of a jury trial. Therefore, I call upon our Supreme Court to make a recurrence to our fundamental principles and reconsider whether the People of this state have a policy of interpreting ambiguities in favor of the right to a jury trial over arbitration.

BERENS v. BERENS

[260 N.C. App. 467 (2018)]

MICHAEL M. BERENS, PLAINTIFF
v.
MELISSA C. BERENS, DEFENDANT

No. COA17-1189

Filed 7 August 2018

1. Divorce—equitable distribution—marital property—529 Savings Plans

The Court of Appeals, considering the issue for the first time, affirmed the trial court's equitable distribution order classifying funds in a 529 Savings Plan, which a married couple created during their marriage for their children's education expenses, as marital property pursuant to N.C.G.S. § 50-20(b)(1). The parents retained ownership and control over the 529 funds and were under no obligation to spend the money on educational expenses.

2. Divorce—equitable distribution—unequal division of property—statutory factors—sufficiency of findings

Where the trial court made an unequal division of property based on the factors in N.C.G.S. § 50-20(c), one of its findings on the statutory factors—regarding the income, property, and liabilities of each party—was insufficient to support its judgment. The trial court declined to make any findings on this factor "as there [was] no evidence to support this distributional factor" even though the wife presented evidence that she currently had no income, while her husband earned more than $300,000 per year.

Appeal by defendant from judgment entered 13 April 2017 by Judge Matt J. Osman in Mecklenburg County District Court. Heard in the Court of Appeals 17 May 2018.

James, McElroy & Diehl, P.A., by Gena Graham Morris and Caroline T. Mitchell, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, for defendant-appellant.

DIETZ, Judge.

The central issue in this appeal is how trial courts in equitable distribution proceedings should classify money in a 529 Savings Plan created

and funded during the marriage. These investment programs permit parents to set aside money for their children's college expenses under tax-favorable conditions.

Defendant Melissa Berens argues that contributions to a 529 Savings Plan are gifts to the parties' children and thus are not marital property. Alternatively, Ms. Berens asks this Court as a policy matter to "carve 529 plans out of the marital estate" through a court-created rule that treats this property differently from other marital assets.

As explained below, we reject Ms. Berens's arguments. The beneficiaries of 529 Savings Plans do not have any ownership or control of the funds; the plan participants can choose not to spend the money on their child's education and (after paying a penalty) spend the money on something else entirely. Thus, contributions to 529 Savings Plans cannot be gifts under property law. Moreover, this Court lacks the authority to create a "carve out" for 529 Savings Plans in the definition of marital property. Equitable distribution is a creature of statute and that change must come, if at all, from the General Assembly. In the meantime, trial courts can and should consider the intended purpose of these marital funds when determining an appropriate equitable distribution.

Ms. Berens also challenges the sufficiency of the trial court's findings of fact. As explained below, one of the court's findings is insufficient under our case law and we therefore vacate and remand the court's order in part. On remand, the trial court, in its discretion, may enter a new order based on the existing record or may conduct any further proceedings that the court deems necessary.

Facts and Procedural History

After more than twenty years of marriage, Michael Berens and Melissa Berens separated in July 2012 and divorced in December 2014. Both parties hold engineering degrees. Mr. Berens is employed and earns more than $300,000 per year. Ms. Berens is a stay-at-home mom.

The parties have six children and, during the marriage, created 529 Savings Plans for several of the children. They funded those 529 Savings Plans with money Mr. Berens earned during the marriage. The parties designated Ms. Berens as the plan participant and owner of the 529 Savings Plan accounts.

In June 2013, Mr. Berens filed a complaint for equitable distribution. After a hearing in mid-November 2016, the trial court entered an equitable distribution order in April 2017. The court determined that an unequal division of the property was equitable and distributed

approximately 57% of the marital estate to Ms. Berens, including the marital home and the 529 Savings Plans. Ms. Berens timely appealed.

Analysis

I. Classification of 529 Savings Plans

[1] The primary issue in this appeal is, somewhat surprisingly, a question of first impression: in an equitable distribution proceeding, how should courts classify funds held in a 529 Savings Plan that a married couple created during the marriage for their child's educational expenses?

A 529 Savings Plan gets its name from Section 529 of the Internal Revenue Code, which permits states to establish "qualified tuition programs." 26 U.S.C. § 529. As relevant here, our State's 529 Savings Plan program permits parents to save money under tax-favorable conditions to later be used for their children's higher education expenses. *See* North Carolina's National College Savings Program, *Program Description* (Jan. 23, 2017), 5, 24.

The issue in this appeal is whether funds that the parties contributed to several 529 Savings Plans during the marriage are marital property. In an equitable distribution proceeding, the trial court must classify the parties' property into one of three categories—marital, divisible, or separate—and then distribute the parties' marital and divisible property. N.C. Gen. Stat. § 50-20. The statute defines marital property as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property." *Id.* § 50-20(b)(1). Property that was acquired but then given away to some third party during the marriage—including a gift to the married couple's minor children—is not subject to equitable distribution. *See Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 274 (1990).

Ms. Berens contends that the money contributed to the parties' 529 Savings Plans were gifts to the children listed as the plan beneficiaries. Thus, she argues, "the accounts fall outside the marital estate and the trial court did not have subject-matter jurisdiction to distribute them." We disagree.

"In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery." *Courts v. Annie Penn Mem'l Hosp., Inc.*, 111 N.C. App. 134, 138, 431 S.E.2d 864, 866 (1993). "These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which

delivery must divest the donor of all right, title, and control over the property given." *Id.*

Applying this settled property law principle, the parties' contributions to their 529 Savings Plans were not gifts. In their briefs, both parties discuss various tax implications of 529 Savings Plan contributions at length. But the treatment of these plans for tax purposes does not control the determination of ownership under the equitable distribution statute. Instead, we look to whether the parties delivered an ownership interest in those funds to their children, thereby divesting themselves of that interest. *Id.*

They did not. As Ms. Berens conceded at oral argument, her children have no ownership rights in the money in the 529 Savings Plans. Our State's 529 Savings Plan criteria state that the plan participants "retain[] ownership of and control over the Account" and their children, as the account beneficiaries, have "no control over any of the Account assets." *Program Description*, at 12. Moreover, parents are under no obligation to spend the money in a 529 Savings Plan on the educational expenses of the children listed as the plan beneficiaries. For example, a family with four 529 Savings Plans, one for each of their four children, could later choose to use all the money for a single child with particularly high college expenses. Or those same parents could withdraw all the money, pay a tax penalty, and buy a vacation home. Whether these are wise decisions, or ones that parents likely would make, is irrelevant—parents *could* do so if they wanted, and this is proof that 529 Savings Plan contributions are not gifts to the plan beneficiaries. *See Courts*, 111 N.C. App. at 138, 431 S.E.2d at 866.[1] Thus, absent some additional actions by the parents to restrict the use of the 529 Savings Plan funds, those funds are solely the property of the parents.

Because the parties owned the funds in the 529 Savings Plans, the trial court properly treated those funds as marital property. Indeed, the trial court had no choice—the parties concede that the 529 Savings Plan accounts consist of money acquired by the parties during the marriage and, as explained above, the parties, not their children, own

1. Ms. Berens also argues that "529 plans are constructive trusts held for the benefit of the children" and thus are not marital property. But the cases on which she relies are inapposite; they involve situations in which the children hold title to property and the court wrests title from them by imposition of a constructive trust in order to accomplish an equitable distribution of marital property. *See*, *e.g.*, *Sharp v. Sharp*, 133 N.C. App. 125, 128, 514 S.E.2d 312, 314, *rev'd on other grounds*, 351 N.C. 37, 519 S.E.2d 523 (1999). Here, by contrast, the parents, not the children, hold title to the property.

the money in those accounts. Thus, the equitable distribution statute required the trial court to classify those funds as marital property. N.C. Gen. Stat. § 50-20(b)(1).

Ms. Berens also argues, compellingly, that classifying a 529 Savings Plan as marital property could have negative policy consequences—most obviously, the risk that the spouse who receives the 529 Savings Plans through equitable distribution might be forced to use those funds for purposes other than the children's educational expenses. She contends that "[i]f it is in the public interest to promote education, then 529 accounts must be removed and protected from the unrelated, fragile contract of marriage."

But the courts are the wrong forum to make this policy argument. Equitable distribution is a creature of statutory law that acts as an alternative to the common law claims and rights that otherwise would govern the parties' ownership of their property following a divorce. *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 688 (1989). As a result, this Court has no authority to do as Ms. Berens requests and "carve 529 plans out of the marital estate for the benefit of the children prior to distribution of property and debts." It is for the General Assembly, not this Court, to define by statute what property is classified as marital and subject to equitable distribution under this statutory scheme.

In any event, the courts are far from powerless to address these policy concerns. After classifying the parties' property according to law, trial courts have broad discretion to distribute marital property in an equitable manner. *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 897–98 (2009). Trial courts can, and should, use this discretion to minimize the risk that one spouse is forced to use marital assets in a 529 Savings Plan for purposes other than the intended beneficiary's educational expenses.[2] But in classifying property, courts must adhere to the requirements of the equitable distribution statute. The trial court properly did so in this case when it classified the parties' 529 Savings Plans as marital property.

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2. Ms. Berens also argues that classifying a 529 Savings Plan as marital property could be unjust when third parties such as grandparents contributed to the plan as well. Those third-party contributions, which would be gifts under property law, might impose separate obligations on the use of the plan funds by the parent. But Ms. Berens concedes that all of the funds in the 529 Savings Plans in this case came from the parties' marital assets and, thus, we need not address that question here.

II. Trial Court's Findings of Fact

[2] Ms. Berens also argues that the trial court's findings of facts are insufficient to support the court's judgment. As explained below, we agree that one of the trial court's findings is infirm and we remand for the court to address this issue.

The equitable distribution statute permits trial courts to order an unequal division of the parties' marital property, provided that the court considers the relevant statutory factors. *Peltzer v. Peltzer*, 222 N.C. App. 784, 788, 732 S.E.2d 357, 360 (2012). Those factors are enumerated in N.C. Gen. Stat. § 50-20(c).

When the court orders an unequal division based on these statutory factors, "the trial court must make findings as to each factor for which evidence was presented." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000). Most disputes over the Section 50-20(c) factors concern how specific the court must be in those findings. *Id.* (collecting cases).

This case presents a different issue. In its order, the court addressed each of the twelve statutory factors individually. For the first factor—the income, property, and liabilities of each party—the court stated that it "declines to make any findings of fact as there is no evidence to support this distributional factor":

> 139. (1) The income, property, and liabilities of each party at the time the division of the property is to become effective.
>
> a. The Court has considered this factor and declines to make any findings of fact as there is no evidence to support this distributional factor.

Ms. Berens argues that this finding is plainly wrong because she presented evidence that she currently had no income and Mr. Berens earned more than $300,000 per year. Ms. Berens contends that, regardless of whether this evidence was sufficient to compel an unequal (in this case, a more unequal) division, it was certainly relevant and thus the trial court erred by finding that there was "no evidence to support this distributional factor."

In his appellee brief, Mr. Berens responds that "[w]hile there may have been evidence presented at trial that *could* have supported this factor being a distributional factor, as the trial court did not find that evidence persuasive, the trial court was not required to list all evidence considered."

Mr. Berens's response is a strawman. The flaw in the court's findings is not the failure to list all potentially relevant evidence—which is not required—but instead the court's statement that there was *no* evidence to support this factor when, in fact, there was.

To be sure, by stating that there was "no evidence to support this distributional factor" the trial court might have meant that it considered the parties' evidence but afforded little or no weight to it. *Peltzer*, 222 N.C. App. at 788, 732 S.E.2d at 360. But that is not what the court's finding states. We therefore vacate in part and remand the court's order for new findings on this statutory factor. Ms. Berens also argues that the court failed to make sufficient findings concerning several other statutory factors, but our review of the court's order and the record satisfies us that the court's findings on those factors are sufficient and we affirm those findings. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

Conclusion

We affirm the trial court's classification of the parties' property but vacate and remand the court's order to address an insufficient finding of fact. On remand, the trial court, in its discretion, may enter a new order based on the existing record or may conduct any further proceedings that the court deems necessary.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and BERGER concur.

DAWN S. BLAIR, PLAINTIFF
v.
EVERETTE LACY BLAIR, DEFENDANT

No. COA17-585

Filed 7 August 2018

1. Appeal and Error—petition for writ of certiorari—additional issues—record incomplete

In an appeal from an equitable distribution order, the Court of Appeals denied a husband's petition for writ of certiorari seeking to raise additional issues apart from those presented in his wife's appeal where the record did not include the necessary documents to allow adequate review. Further, the husband did not object to the introduction of an expert's report, meaning his arguments would be limited to the weight of the evidence, not admissibility.

2. Divorce—equitable distribution—partnership percentages—evidentiary support

In an equitable distribution action, the trial court's findings of fact and conclusions of law that a husband's percentage of a partnership with his father was fifty percent were based on sufficient evidence, despite tax returns that said otherwise; it is within the trial court's purview to determine which evidence it finds more credible.

3. Divorce—equitable distribution—business valuation—unchallenged findings

In an equitable distribution action, a wife's challenges to the trial court's valuation of her husband's business at the date of their separation were overruled where the trial court's unchallenged findings of fact were supported by the evidence.

4. Divorce—equitable distribution—business valuation—appreciation—active versus passive

Although any increase in value of separate property during a marriage is presumed to be marital property, the trial court in an equitable distribution action did not err in designating half the appreciation in value of a husband's partnership during the marriage as passive, and thus the husband's separate property, based on evidence that adequately rebutted that presumption. Sufficient evidence was presented to support the trial court's reasoned calculation that part of the appreciation in value was attributed to efforts by the husband's father and to changes in market conditions.

5. Divorce—equitable distribution—post-separation business distributions—tax return characterization binding

In an equitable distribution action, the trial court erred in classifying all of the post-separation business distributions as a husband's self-employment income, and therefore separate property, after the court determined that half the husband's share of the business was marital property. The evidence did not make clear whether the payments represented income to the husband, a return on capital (which would be classified as divisible property), or were of another nature. Any reclassification on remand must take into account the characterization of the distributions on the business's partnership tax returns, which are binding on the parties.

Appeal by plaintiff from order and judgment entered 4 November 2016 by Judge Sherri W. Elliott in District Court, Caldwell County. Heard in the Court of Appeals 29 November 2017.

Wesley E. Starnes, for plaintiff-appellant.

Wilson, Lackey & Rohr, P.C., by David S. Lackey, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals order and judgment regarding equitable distribution. We affirm the trial court's classification and valuation of the defendant's interest in a partnership with his father, but reverse the classification of the post-separation distributions from the partnership to defendant and remand for entry of a new order which classifies these post-separation distributions as divisible property and orders a new distribution.

I. Background

Plaintiff Dawn Blair ("Wife") and Defendant Everette Blair ("Husband") were married on 28 February 1994 and separated on 31 August 2011. On 6 October 2011, Wife filed a complaint with claims against Husband for post-separation support, alimony, equitable distribution, and attorney fees.[1] On 16 November 2011, Husband filed an answer and counterclaim for equitable distribution. Wife and Husband

1. Wife's claim for alimony was dismissed and is not a subject of this appeal.

both alleged they were entitled to a greater than one-half distribution of marital property based upon statutory factors under North Carolina General Statute § 50-20(c).

Trial of equitable distribution was held on 16 October, 10 December, and 12 December of 2014; and the 24th and 25th of August 2015. The issues on appeal all are related to the classification, valuation, and distribution of Blair Iron and Metal ("the Business"), a partnership between Husband and Joe Blair, his father. The equitable distribution judgment was entered on 4 November 2016, and Wife filed notice of appeal.

II. Petition for Certiorari

[1] Husband filed a petition for certiorari, requesting to assert issues on appeal also arising out of the classification and valuation of the Business. Husband avers that he failed to file notice of his cross-appeal under N.C. R. App. P. 3(c)(3) due to excusable neglect, as his counsel did not realize a notice of appeal was required for the issues he wished to present on appeal, which were listed in the record on appeal as his proposed issues. Husband states in his petition that the issues he wished to present were (1) whether evidence from Ms. Fonvielle regarding date of marriage value of the Business should have been excluded because it was not disclosed in discovery; (2) whether Ms. Fonvielle's valuation of the Business should have been excluded for various reasons; and (3) whether the trial court erred by excluding Husband's proposed expert witness, Mr. Prestwood, regarding valuation of the Business.[2] Husband states in his petition that there are "no attachments to this Petition because everything required for this Court to consider[," as to whether to issue Writ appears in the Record.

From our review of the transcript and record, the record does not include everything required for us to consider Husband's proposed issues. All three of these issues are based primarily upon Ms. Fonvielle's valuation and the information upon which she based her evaluation. But Ms. Fonvielle was appointed as the expert to do the business valuation by a consent order which is not in our record. The trial court ruled that Mr. Prestwood could not testify based upon that consent order:

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2. Husband listed seven proposed issues in the Record on Appeal. The three issues addressed in his petition for certiorari encompass most of the issues in the Record on Appeal, although not worded exactly the same. The remaining proposed issues generally relate to determination of the marital interest in the Business, and we have addressed these issues based upon Wife's appeal.

> THE COURT: In looking at the consent order of September the 5th, 2012, um, and remembering the discussions that surrounded the appointment of an expert to value Blair Iron & Metal, specifically that consent order does say that the parties requested the Court to appoint an expert, and it was the Court's appointment of the expert upon the request, joint request, of the plaintiff and defendant, um, and so I am going to disallow the testimony of Mr. Prestwood as the Court had the expert appointed to value this business. Mr. Lackey, I understand you weren't involved then, but Mr. Blair as represented by counsel, um, and that's the Court's ruling.
>
> MR. BEACH: Thank you, Your Honor.

Without the consent order appointing Ms. Fonvielle, we would be unable to review this ruling by the trial court. We would also be unable to determine the exact scope and terms of Ms. Fonvielle's valuation set out in that order, so we would be unable to review Husband's other proposed issues. We also note that Husband did not object to the introduction of Ms. Fonvielle's report as evidence at trial and that his arguments attacking her valuation go to weight and credibility of the evidence, not admissibility. We therefore deny Husband's petition for certiorari to address his proposed issues.

III. Equitable Distribution

Wife raises seven issues on appeal and challenges many findings of fact, although some findings of fact Wife challenges are mixed with conclusions of law. To make matters more confusing, Wife's brief addresses only four issues in detail, and for the remaining issues she simply notes that the issue is "the same issue" as addressed in the argument for another issue but "because of the complex and mixed nature of the issues, it is submitted again here to make clear the nature of the challenges." So according to Wife's brief, issues I, II and VI are really "the same issue[;]" III, IV, and V are "the same issue[;]" and VII stands alone. We will attempt to sort out these "complex and mixed" issues in some rational manner but would encourage appellants to organize issues in a more orderly fashion. For example, if three issues are "the same issue," then they should be presented together as one issue. Furthermore, although Wife's brief mentions many findings of fact in the issues and the headings of the arguments contend that some findings are not supported by the evidence, the substance of her brief does not challenge the findings of fact as unsupported by the evidence. Wife's actual issues arise from the trial court's conclusions of law -- which at times are

labeled as findings of fact -- and thus we address the substance of Wife's arguments which is the trial court's legal conclusions.

A. Standard of Review

Standards of review guide the Court's consideration of all appeals, so they are also useful in determining an orderly manner for presentation of issues. Unfortunately, Wife's brief states several standards of review for each argument, since the issues in each are mixed. If the findings of fact upon which the challenged conclusions of law are not supported by the evidence, the conclusions themselves must fail. *See generally Peltzer v. Peltzer*, 222 N.C. App. 784, 786, 732 S.E.2d 357, 359 (2012). If the findings are supported by the evidence, then we review de novo the trial court's conclusions of law based on those findings. *See generally id*; *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Restated,

> [t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Peltzer, 222 N.C. App. at 786, 732 S.E.2d at 359 (citations, quotation marks, and brackets omitted). Also,

> [t]he labels "findings of fact" and "conclusions of law" employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that "finding" de novo.

Westmoreland, 218 N.C. App. at 79, 721 S.E.2d at 716 (citations omitted).

Furthermore, classification of property is a conclusion of law which we review *de novo*:

> Because the classification of property in an equitable distribution proceeding requires the application of legal

> principles, this determination is most appropriately considered a conclusion of law. The conclusion that property is either marital, separate or non-marital, must be supported by written findings of fact. Appropriate findings of fact include, but are not limited to, (1) the date the property was acquired, (2) who acquired the property, (3) the date of the marriage, (4) the date of separation, and (5) how the property was acquired (i.e., by gift, bequest, or purchase).

Hunt v. Hunt, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993) (citations omitted); *see generally Westmoreland*, 218 N.C. App. at 79, 721 S.E.2d at 716.

Finally, we review the distribution of the marital property for clear abuse of discretion:

> As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.
>
> The trial court's unchallenged findings of fact are presumed to be supported by competent evidence.

Peltzer, 222 N.C. App. at 787, 732 S.E.2d at 359-60 (citations, quotation marks, and brackets omitted).

Again, because Wife's actual issues are objections to the trial court's conclusions of law, and those conclusions are mixed in with the findings of fact in the order, we assume that Wife listed the findings as part of her issues on appeal because she had difficulty separating the findings from the conclusions. We have had the same problem. We will simply start at the beginning of the order and address Wife's challenges to the conclusions of law as they appear in the order.

B. Partnership Percentages

[2] Evidence relevant to the issues on appeal was presented at the three days of hearing in 2014 and two days in 2015. Almost all of the substantive evidence regarding the Business was presented in 2014. The Business was originally known as Blair Auto and Machine and was a sole proprietorship of Joe Blair. At its inception, the Business did primarily car repair and repair of specialized machinery parts. The trial

court's findings about the formation and existence of the partnership between Husband and his father are not challenged on appeal, although the percentage interest of Husband is an issue.[3] Some findings regarding the formation of the business are uncontested:

> 12. In December 1993 the Defendant, Plaintiff, Joe Blair and May Blair had several discussions concerning the Defendant quitting his job and going into business with Joe Blair.
>
> 13. The parties were quite informal regarding the formation of a partnership. The idea was discussed at two meetings where all four were present. In addition, the Plaintiff and Defendant had some discussions over a One to two month period. Also, the Defendant and his father had several discussions regarding forming a partnership.
>
> . . . .
>
> 15. The Defendant was the primary manager and also the day to day operations manager of the partnership he had formed with his father.
>
> 16. The purpose of the partnership was to maintain the business Joe Blair operated and further develop a recyclable material business as a wholesaler.
>
> 18.[4] The Defendant quit his employment at Burns Wood Products as of February 11, 1994. . . .
>
> 19. No paper writing was ever drawn concerning the operation and interests of the partnership. The Defendant did not "buy into" the partnership; he just began working and managing the partnership's business. All capital, machinery, equipment, buildings, vehicles etc. were Mr. Joe Blair's at the formation of the partnership.
>
> 20. Defendant's partnership interest was gift to him alone from his father, and it was made before the parties' date of marriage.

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3. The trial court found that Wife was not a partner in the Business, and she does not contest that finding on appeal, although the transcript shows that it was a "theory" she advocated at trial.

4. Trial court skipped finding number 17.

21. No partnership documents were filed with the Secretary of State nor any other government entity except for tax records and some records regarding the purchase of equipment. A special account was opened at First Union not in the name of the partnership but titled "Joe and Everette Blair Special Account."

22. Tax records for 1994 indicate the partnership was formed on January 1, 1994.

23. The partnership between Joe Blair, Defendant's father, and Everette Blair, Defendant, was formed on January, 1, 1994.

24. The tax records indicate the partnership's profits and liabilities were allocated at 70% to the Defendant and 30% to Joe Blair. These percentages of profit and liabilities were maintained from 1994 through and including tax year 2000.

25. In tax year 2001, the company name of Blair Auto and Machine was changed to Blair Iron and Metal. The tax records from 2001 through 2013 represent the company name as Blair Iron and Metal.

26. In tax year 2001, the records show the partnership's profits and liabilities changed for Everette Blair from 70% to 60%. The tax records show the change of the partnership's profits and liabilities for Joe Blair changed from 30% to 40%. See Plaintiff's Exhibit #10.

27. From tax year 2002 until tax year 2013, the partners listed for Blair Iron and Metal were Joe Blair and Everette Blair. The percentage of profits and liabilities remained consistent for each tax year as Everette Blair having a 60% and Joe Blair having a 40%. See Plaintiff's Exhibits #17 - #28.

Plaintiff challenges these "findings of fact" regarding the partnership percentages:

33. Even though many of the partnership tax returns show that the Defendant received 60% of the profits, the partnership was between the Defendant and his father, Joe Blair, with 50% ownership by the Defendant and a 50% ownership interest by Joe Blair. Mr. Joe Blair routinely

> allowed the Defendant to take more than 50% of the profits because the Defendant had a young family, including a step-daughter by the Plaintiff, to support. The generosity of the Defendant's father and mother for that matter is further demonstrated by the fact that the parties' real estate was a gift to them from the Defendant's parents.[5]
>
> . . . .
>
> 61. The Court finds the partnership interest of the Defendant on the date of separation was 50%.

Wife also challenges Findings 64 and 65, regarding Husband's 50% partnership interest and the basic math which results from applying a 50% interest to the values determined.

Findings of fact 26 and 27, which are not challenged, also addressed the income tax returns and the partner's percentages of interest on the returns. The tax returns of the partnership were admitted as evidence, and as the finding states, the tax returns showed Husband's partnership interest as sixty percent. Despite repeatedly filing tax returns "under penalty of perjury" which set forth a sixty percent interest for Husband, Husband testified that the business was actually a fifty-fifty partnership:

> Q. Mr. Blair, do you -- did you and your father have an agreement as to your percentage ownership of the partnership? Were you fifty/fifty, forty/sixty, seventy/thirty? Was there an agreement about that?
>
> A. Yes.
>
> Q. What was the agreement?
>
> A. We were equal partners, fifty/fifty.
>
> Q. Can you explain to us why, as the tax returns will show over the years, you almost always took something more than fifty percent of the distributions of the partnership's profits?
>
> A. Yes. The whole, or main purpose, of our joining as a partnership was to help to provide for me a means of living and income to support a family, which I was beginning and already had children. Uh, in the early years,

5. Finding 33 is supported by the evidence, and Wife does not contend otherwise, but rather challenges the conclusion of law regarding the percentages of ownership.

> especially, there was not enough income, profit, to barely support one person, let alone two. And it was always the intent, uh, of--of us both that that was the primary purpose of the business was to provide a living for me, as well as he, uh, as it would provide. The, uh, the amounts through the years have always swayed in my favor, as far as the draws or pays or whatever you want to call them, uh, because I always took the larger percentage. I had a family to raise and needed more income. Uh, the -- as far as the tax returns and those percentages are shown, those were just what the tax people told us we needed to do, because I was taking the majority (inaudible), you know, I don't know if we just kind of followed along with what we were told we should do.

Although the tax returns are substantial evidence of the partnership percentages, they are not dispositive in this context. The evidence is conflicting, but the credibility and weight of the evidence, which includes the tax returns and testimony, are evaluated by the trial court. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." (citation and quotation marks omitted)).

In *Davis v. Davis*, this Court addressed the sufficiency of the evidence in an action seeking the dissolution of an alleged partnership. 58 N.C. App. 25, 26, 293 S.E.2d 268, 269 (1982). The defendant denied the existence of a partnership based upon there being no written partnership agreement and his contention that the parties "never had a meeting of the minds on a verbal partnership agreement." *Id.* at 27, 293 S.E.2d at 269 (quotation marks omitted). This Court noted the evidence regarding the formation of a partnership, including the partnership tax returns filed by the parties:

> Plaintiff's evidence clearly shows that the parties discussed his coming into the business which led to their subsequent engagement together in business transactions. Plaintiff understood their oral agreement to provide that he would own 30% of the business, but William stated that the terms of their agreement were that initially he would get thirty percent of the net profits of the business after all expenses. In addition, there is evidence that

> William considered plaintiff as management because he could not trust an employee. The evidence that plaintiff received a share of the profits of the business therefore is *prima facie* evidence that he is a partner because there is no other evidence that the share of the profits paid to plaintiff was considered employee's wages.
>
> Further, the filing of a partnership tax return is significant evidence of the existence of a partnership. Under the State and Federal income tax laws, a business partnership return may only be filed on behalf of an enterprise entered to carry on a business. There is evidence in the present case that William prepared the tax return for the business indicating himself and plaintiff as co-owners. This constitutes a significant admission by William against his interest in denying the existence of a partnership.
>
> Although William testified that he and plaintiff never agreed on the terms of a partnership, the evidence of the acts and declarations of the parties was sufficient for the jury to infer that a partnership existed in which William and plaintiff were the owners in 70% and 30% shares. Thus, the trial judge did not err in denying defendants' motions for directed verdict and for judgment notwithstanding the verdict.

Id. at 30–31, 293 S.E.2d at 271–72 (citations, quotation marks, and brackets omitted).

Although *Davis* was a business dispute decided by a jury, it is instructive here because this Court noted the evidence of the income tax returns was "a significant admission by [the defendant] against interest" in denying the formation of a partnership, and arguably, by extension, the returns would also be significant evidence of the partners' percentages of interest. *Id.* at 31, 293 S.E.2d at 272. But the tax returns were not dispositive, because the jury had the option to accept either the income tax returns as supporting the existence of a partnership or the defendant's testimony there was no partnership, despite the tax returns. *See id.* at 31-32, 293 S.E.2d at 272. In *Davis*, the jury ultimately found the tax returns and the plaintiff more credible and decided there was a partnership in which plaintiff was a 30% partner. *See id.* at 31, 293 S.E.2d at 272.

Here, the trial court found Husband's testimony that his interest in the partnership was only 50% to be credible and rejected the evidence of the tax returns based upon Husband's testimony that the tax returns

"just kind of followed along with what we were told we should do" by "the tax people[.]" "In an equitable distribution case, the trial court is the fact-finder. Fact-finders have a right to believe all, none, or some of a witness' testimony." *Zurosky v. Shaffer*, 236 N.C. App. 219, 240, 763 S.E.2d 755, 768 (2014) (citations omitted). Wife's argument on the trial court's determination that Husband's partnership interest was 50% is overruled.

C. Valuation of the Business

[3] Wife also challenges several findings of fact regarding the trial court's valuation of the business as of the date of separation. We first summarize the relevant findings which are not challenged on appeal. The trial court found the value of the business as of the date of marriage was $10,000, based upon the estimate of the expert witness on valuation; there was no other evidence of value as of the date on marriage presented, since Husband's valuation was simply "more than" $10,000, and Wife had only "a 'guess[.]' " The trial court noted that the parties entered into a consent order on 5 September 2012 appointing Betsy H. Fonvielle, CPA,[6] as an expert witness to conduct an appraisal of the Business.[7] The trial court also noted Ms. Fonvielle's qualifications, accreditation, and experience as an expert witness in business evaluation. Several findings, not challenged on appeal, addressed the valuation process and methodology:

> 43. Ms. Fonvielle used several factors in her valuation of the partnership on the date of marriage as follows:
>
> a. The tax records indicate the property initially placed in the partnership was one 14" shear listed as depreciable property placed in service as having a value of $1,200. Also listed was a Chevy truck placed in service having a value of $19,000 and used 80% as business purposes. Finally, listed was a 1991 Buick placed in service having a value of $10,000 and used for business purposes 68%. The business depreciative value was $7400 for the 1983 Chevy truck and $6800 for the 1991 Buick.

---

6. The CPA's name is spelled in different ways throughout in our record. The transcript notes it as "Fonville" while the trial court spells it "Fonvielle." Ms. Fonvielle's own letterhead is spelled as the trial court spelled it. We will use the trial court's spelling in our opinion but some of our quotes will use the "Fonville" spelling because that is how her name was spelled in that document.

7. The consent order is not in our record, so the only information we have regarding the terms of Ms. Fonvielle's evaluation is from her report, some emails and letters, and her trial testimony.

The partnership listed no other assets. See Plaintiff's Exhibit #7.

b. The taxable income for Blair Auto and Machine for tax year 1994 was $20,434.00. The partnership sales were $46,747.00. Inventory was listed as zero as of January 1, 1994. See Plaintiff's Exhibit #7.

c. A special account was set up at First Union Bank in the name of Joe Blair and Everette Blair and showed a balance of $867.94 as of February, 1994. The statement indicates the previous balance was zero.

d. The business did use some tools which had been accumulated previously by Joe Blair such as turning lathes, drill presses, grinders, hand tools, milling machine, and a cable crane. Some of these machines and tools are still used in the business.

. . . .

46. Over the first three to six years of the partnership, the company increased its focus toward collecting scrap metal for recycling instead of equipment and car repair. It developed facilities to include a small office building, drive-on scales, grading a large area of its 2.5 acres for storage and sorting metals.

47. The business purchased metal for recycling from the public from 1994 until the parties' separation.

48. The business also placed containers at various plants, including local metal and fabricating businesses, to recycle metal from their scrap. Sometimes the business contracted to purchase the scrap from these plants and sometimes the plants do not charge in an effort to simply get rid of their scrap.

49. The Defendant's business operations from the formation of the partnership until the date of separation were six days per week, having six working employees and the business being opened to the public for sales, all of which was intended to increase business profitability. The Defendant reinvested heavily in equipment as displayed on Exhibit G in Plaintiff's Exhibit #1 referenced hereto and incorporated hereby by reference.

50. The costs of equipment is listed Exhibit G reflects as value of $613,541.00. The Court recognizes this is not an estimate of the fair market value of the equipment on that day; however, it does reflect the heavy reinvestment undertaken by the partners up until date of separation.

51. Upon entering into an engagement agreement with the parties, Ms. Fonvielle gathered financial data from the partnership tax returns including a list of assets requested of documents reflecting liabilities of the partnership, and bank statements of the partnership. She undertook a site visit to the company, interviewed the Defendant regarding the history of the operations and profitability of the company, and she interviewed the Plaintiff regarding the history of the operations and profitability of the company.

52. Mrs. Fonvielle found some of the financial information incomplete. The balance sheets of the company did not balance. While requested, neither the Defendant nor the Plaintiff provided any documentation of the amount of inventory on the date of separation. However, both parties did provide estimates based upon their recollection during interviews and Court testimony. Mrs. Fonvielle did consider these amounts and compared the amounts to industry wide data in determining her estimate of value.

53. At the request of the Defendant, Ms. Fonvielle again valued the company as of· December 31, 2013. At that time she examined further tax records, journals of income and expenses, and bank statements of the company. She interviewed the Plaintiff and the Defendant regarding business operations and profitability since her first evaluation. Ms. Fonvielle did a similar comparison of the economic forecast, industry data, and regional competition as in her first analysis.

54. Ms. Fonvielle used three different accounting valuation methods in determining the value of the partnership for both points in time.

55. She used the Net Asset Approach, the Capitalized Earnings Approach, and the Direct Market Data Approach.

> An Asset valuation of the partnership was not performed. See Plaintiff's Exhibit #1.
>
> 56. Ms. Fonvielle further discounted the business due to the partnership being a family owned business and its lack of liquidity by 10%.
>
> 57. Ms. Fonvielle did not discount or considered how accrued, but unpaid rent to Mr. and Mrs. Joe Blair by the partnership impacted the value of Blair by the partnership impacted the value of Blair Iron and Metal on either the date of separation value or December 13, 2013 valuation date.

But Wife does challenge finding 58:

> 58. Ms. Fonvielle appraised the value of Blair Iron and Metal on the date of separation as Five Hundred Forty Thousand Dollars ($540,000.00) with Defendant's 50% interest in Blair Iron and Metal as being $270,000.00. Ms. Fonvielle's appraisal was based on consideration of the three approaches to determining value: the net asset approach, the capitalized earnings approach, and the direct market data approach.

Finding 58 first simply recites Ms. Fonvielle's valuation as of the date of separation as $540,000; it is not a finding of fact but only a recitation of evidence. The trial court did not *find* the same value as Ms. Fonvielle but instead found a different value in Finding 60, which Wife did not challenge: "Giving full weight to 2009 earnings and applying the result to the mathematical calculations shown in Ms. Fonvielle's report, the Court finds that the fair market value of Defendant's interest in Blair Iron and Metal as of the date of separation was $232,183.00." The remainder of Finding 58 also notes the valuation methods Ms. Fonvielle used; the evidence shows that she did use these methods, although the trial court explained in unchallenged Finding 59 why it did not agree with Ms. Fonvielle's value in Finding 58:

> 59. Ms. Fonvielle's appraised values are overstated because in her capitalized earnings approach to value, Ms. Fonvielle completely disregarded Blair Iron and Metal's unusually low earnings in 2009 while giving full weight to its unusually high earnings in 2008. The Court finds that if Blair Iron & Metal's unusually high earnings in 2008 are given full weight, then its unusually low earnings

> in 2009 must also be given full weight in determining fair market value.

The trial court went on to make these unchallenged findings:

> 62. The value of the partnership of Blair Iron and Metal on the date of separation was Four Hundred Sixty-four Thousand Three Hundred Sixty-seven Dollars ($464,367.00).
>
> 63. The value of Defendant's 50% interest in Blair Iron and Metal on the date of separation was Two Hundred Thirty-two Thousand One Hundred Eighty-three Dollars ($232,183.00).

Wife also challenges other findings of fact regarding valuation, but those findings again address the trial court's determination, which we have already addressed, that Husband had a 50% interest in the Business. This argument is overruled.

D. Classification of Appreciation during Marriage

[4] Wife contends the increase in the value of the Business during the marriage was active and thus marital, so the trial court erred in characterizing one-half of the increase in value since the date of marriage as passive appreciation, and thus Husband's separate property. Wife challenges Finding 66: "The increase in value during the marriage of Defendant's 50% interest in Blair Iron and Metal is composed of active appreciation and passive appreciation." Wife next notes several findings of fact but does not argue they are unsupported by the evidence. Instead, Wife challenges the conclusions of law mixed into these "findings" as not supported by the findings or the law; these findings are:

> 67. The Court finds that not all of the increase in Defendant's interest in Blair Iron and Metal was attributable to active appreciation due to Defendant's efforts. Defendant's father worked in the business along with Defendant. He contributed machinery and equipment to the business. The business operated on property owned by Defendant's parents without having to pay any rent. Defendant's father made some of the equipment used in the business. Furthermore, he used his expertise as a mechanic to repair and maintain the equipment and machinery used in the business, saving the business from having to pay a third party for such repairs and maintenance and/or purchase new machinery and equipment.

The active efforts of a third party, Defendant's father, contributed to the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage.

68. Market conditions also contributed to the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage. In early 1995 Blair Iron and Metal was receiving approximately $3.50 per CW for the scrap metals it sold. In late 2008 and early 2009, it was receiving approximately $6.25 per CW. In 2011, the year of the parties' separation, it was receiving $16.00 and $17.00 per CW for scrap metals. During the marriage the price Blair Iron and Metal received for the scrap metal it sold increased more than 450%. This is purely market-driven appreciation in the price of Blair Iron and Metal's product that has nothing to do with Defendant's efforts.

69. At least one-half (1/2) of the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage was attributable to factors other than active appreciation due to Defendant's efforts.

70. Fifty percent (50%) of the increase in value of Blair Iron and Metal from the date of marriage, February 28, 1994, to the date of separation, August 31, 2011, was due to the active appreciation in the business by the martial efforts of the Plaintiff and Defendant, and Fifty percent (50%) of the increase in value of Blair Iron and Metal from the date of marriage, February 28, 1994, to the date of separation, August 31, 2011, was due to passive appreciation through efforts of Joe Blair and market conditions.

71. The marital interest in Defendant's interest in Blair Iron and Metal as of the date of separation was 1/2 ($227,183.00) = $113,592.00.

Husband initially acquired his interest in the Business from his father as a gift just prior to the marriage, and the trial court valued the Business at $10,000 at that time.[8] During the marriage, Husband worked in the Business and it appreciated in value. Wife contends that Husband failed to rebut the presumption that the increase in the value of the Business

8. Husband acquired his interest in the business on 1 January 1994, although he did not quit his other job and work with the business full-time until 11 February 1994. The parties were married on 28 February 1994.

during the marriage was marital property and challenges the trial court's allocation of appreciation during the marriage as half passive because it wrongfully relied upon "the efforts of [Husband's] father" and "market conditions[.]" (Quotation marks omitted).

Wife correctly notes that based upon the findings that the Business increased in value during the marriage, there is a presumption that the appreciation is active and therefore marital, and the burden of proof was on Husband to rebut that presumption and show that the increase was passive:

> When marital efforts actively increase the value of separate property, the increase in value is marital property and is subject to distribution. To demonstrate active appreciation of separate property, there must be a showing of the (1) value of asset at time of acquisition, (2) value of asset at date of separation, (3) difference between the two. *Any increase is presumptively marital property unless it is shown to be the result of passive appreciation.*
>
> > In light of the remedial nature of the statute and the policies on which it is based, we interpret its provision concerning the classification of the increase in value of separate property as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise by one or both of the spouses.
>
> In order for the court to value active appreciation of separate property and distribute the increase as marital property, the party seeking distribution of the property must offer credible evidence showing the amount and nature of the increase.

Conway v. Conway, 131 N.C. App. 609, 615–16, 508 S.E.2d 812, 817–18 (1998) (emphasis added) (citations and quotation marks omitted).

Wife argues that Husband's father's work in the Business should not be considered as passive appreciation since he is a partner, but appreciation from contributions by a business partner of a spouse can be considered as passive appreciation. *See generally Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). In *Lawing*, the defendant-husband owed 48% of the shares in a corporation, "Lawings, Inc. ('LINC')," while the plaintiff-wife owned 6%, and husband's brother owned the

remaining shares. 81 N.C. App. at 161, 344 S.E.2d at 103. Some of the husband's shares were inherited from his father and were his separate property. *See id.* at 174, 344 S.E.2d at 110. LINC increased in value substantially during the marriage. *See id.* The plaintiff-wife argued on appeal the trial court erred by treating all of the appreciation in the husband's separate shares of LINC as his separate property, and this Court agreed:

> This Court has recently addressed questions of this type in applying G.S. 50–20(b)(2), under which inherited property is separate property and increases in value of separate property are also separate property. In each case we have held that increases in value remained separate property only to the extent that the increases were passive, as opposed to active appreciation resulting from the contributions of the parties during the marriage. *McLeod v. McLeod*, *supra*; *Phillips v. Phillips*, *supra*; *Wade v. Wade*, *supra*. . . . . [W]e hold that the *Wade-Phillips-McLeod* rule applies here.

Id. at 174-75, 344 S.E.2d at 110. Here the trial court used the approach in *Lawing* to value the appreciation during the marriage. *See id.* But Wife contends that the evidence was not sufficient to support the trial court's determination that half of the appreciation was active and half was passive, so the presumption the increase was marital should apply.

However, *Lawing* specifically approved consideration of the efforts of a third party who is active in the business as a factor in the passive appreciation in value during the marriage:

> Plaintiff urges that we apply *McLeod* and *Phillips* to the entire appreciation in value. She relies on her evidence that she and defendant ran the corporation, defendant's statements that Plato did not have a real share in business decisions, and defendant's dominance in handling business finances. She contends that this total control by the parties means the entire appreciation should have been designated marital property. Plato testified however that he had an equal share in running the business, and defendant's later statements agree with Plato. *On this record the court could properly find that some part of the appreciation in value was due to the efforts of Plato Lawing.* For the purposes of evaluating the contributions to the marital economy for equitable distribution, we see

no difference between "passive" increases in separate property (interest, inflation) and "active" increases brought about by the labor of third parties for whom neither spouse has responsibility. The court therefore correctly rejected plaintiff's contention that she was entitled to marital treatment of the entire increase in value of the inherited stock.

Nevertheless it would be contrary to the spirit of the Equitable Distribution Act and our decisions in *McLeod* and *Phillips* to hold that simply because a third party worked with plaintiff and defendant in a closely-held corporation, all increase in value automatically is exempted from treatment as marital property. Although the owner of separate shares was treated as the sole owner in *Phillips*, the presence of some minimal (2%) third party involvement did not preclude treatment of corporate appreciation during the marriage as marital property. Other states have generally recognized "active" appreciation of fractional interests in corporations as marital property, even though the underlying shareholder interest was separate property.

Here the entire appreciation in value of the inherited shares was clearly identified for the trial court. The portion of the appreciation attributable to the active efforts of the parties was property "acquired" during the marriage. It therefore was presumably marital in nature. *The only evidence regarding the appreciation was that sketchy evidence discussed above: that evidence did not rebut the presumption of marital property, but only plaintiff's claim to the entire appreciation.*

We therefore hold that the court erred in ruling that the entire appreciation in value of these separate shares was separate property. *We remand for a determination of the proportion of the appreciation that may properly be classified as marital property. The court should make findings as to the value of the shares at the time of the inheritance and as of the date of valuation. It then should determine what proportion of that increase was due to funds, talent or labor that were contributed by the marital community, as opposed to passive increases due to interest and rising land value of land owned at inheritance, and the efforts of Plato.* We recognize that

> we cannot require mathematical precision in making this determination. Nevertheless, the trial court must make a reasoned valuation, identifying to the extent possible the factors it considered.

Id. at 175-76, 344 S.E.2d at 111–12 (citations and headings omitted).

Here, the trial court followed exactly the process directed by *Lawing*. *See generally id.* The trial court's findings show it made a "reasoned valuation" of the contribution of Husband's father to the appreciation in the Business. *Id.* at 176, 344 S.E.2d at 112. The law "cannot require mathematical precision in making" the allocation of passive and active appreciation during the marriage, but it is sufficient for the trial court to "make a reasoned valuation, identifying to the extent possible the factors it considered." *Id.* Specifically, the trial court noted that Joe started the business, which was operated on Joe's land. Joe had a "reputation in the community of being able to 'fix' or 'make' anything relating to machines, machinery, automobiles, engines, and/or motors." In addition, the trial court found

> Defendant's father worked in the business along with Defendant. He contributed machinery and equipment to the business. The business operated on property owned by Defendant's parents without having to pay any rent. Defendant's father made some of the equipment used in the business. Furthermore, he used his expertise as a mechanic to repair and maintain the equipment and machinery used in the business, saving the business from having to pay a third party for such repairs and maintenance and/or purchase new machinery and equipment.

The trial court did not err in concluding that "[t]he active efforts of a third party, Defendant's father, contributed to the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage."

Wife also argues the trial court erred in considering changes in market conditions as a cause of the passive appreciation. Wife claims that although market conditions can be a proper consideration, "defendant merely offered that the rate of compensation for certain scrap materials had changed. The impact of these changes on the value of the business was never explained." (Citation omitted). Wife then notes that other factors could also contribute to appreciation, such as Husband's decision to switch the focus of the Business to scrap metal and the types of scrap metal he obtained.

We have reviewed the trial testimony regarding the Business, the change to a scrap metal business from auto repair, changes in the prices and markets for scrap metal, and the expert valuation of the Business, and Husband offered sufficient evidence for the trial court to consider market conditions. Again, the law does not "require mathematical precision" in determining exactly how much the changes in market conditions contributed to the increase in value of the Business. *Id.* The trial court was well within its discretion to consider the evidence of changes in market conditions as contributing to the passive appreciation in the business during the marriage.

E. Post-Separation Distributions to Husband

[5] Wife's remaining issues challenge the trial court's findings of fact and conclusions of law regarding post-separation distributions from the Business to Husband.[9] In finding 77, the trial court found distributions from the Business to each partner for these years:

Year:	Husband's distributions:	Joe's distributions
2009	82,100	
2010	87,950	
2011	111,226	174,220
2012	65,300	31,700
2013	39,900	81,000

Wife challenges these findings:

> 76. As of the date of separation, Joe Blair was 72 years of age and in declining health. He can no longer handle the physical labor portion of the business. He has had bypass surgery and spinal degeneration, among other health problems. Many times he uses a wheelchair. He still works and does as much as he can to help with his former job duties. As a result, the equipment necessary to the company's operations declined. Competition in the scrap metal business increased, with some of Blair Iron and Metal's competitors being bought by conglomerates. Blair Iron and Metal could no longer compete on

9. These issues are separated into Issues I, II and VI in Wife's brief.

> price to purchase scrap metal from the public, and came to rely solely on its industrial and commercial customers as sources of scrap metal. It lost some of those customers as well. Blair Iron and Metal's location on a rural road, as opposed to its main competitors being located on U.S. Highway 321, a major highway, also contributed to its inability to compete in purchasing scrap metal from the public. In addition, after the date of separation the market price of scrap metal declined from $16.00 and $17.00 per CW to $13.50 per CW.
>
> . . . .
>
> 78. The post separation withdrawals were compensation for Defendant's active management efforts of Blair Iron and Metal and other daily management services and are the Defendant's separate property, not divisible property.

Wife argues that "[a]t best, the funds distributed after the date of separation would only partially represent salary for [Husband]; a portion would be a return on investment." Because one-half of Husband's share of the Business is marital property, the same percentage of distributions after the date of separation representing the partnership's return on investment would be divisible property. *See* N.C. Gen. Stat. § 50-20(b)(4)(c) (2015) (defining divisible property as "[p]assive income from marital property received after the date of separation, including, but not limited to, interest and dividends.").

Wife notes that Ms. Fonvielle presented evidence regarding the nature of the post-separation distributions to Husband:

> Q. All right. Well, let's go through it then. How would you characterize it, Ms. Fonville, as far as their distributions –– . . . . compared to the revenue of the company?
>
> . . . .
>
> A. Um, well, the – the distributions are substantial, uh, but, you know, the business is making money. It's more than, uh, a salary that they would be paid for the work they did, but then they've invested in the company, so some of it's, um paying them for their efforts and some of it[']s return on their investment in the company.
>
> . . . .

THE COURT: Could you repeat that? You said some of the – you – when looking at the distributions on page 15, that some of the distribution portion, you're saying you're – they – you're looking at that significant, yes, but they were paying it some as salary, some as a – as a return on their investment? Is that how you characterized the distributions? Is that what you were ----

THE WITNESS: I-I – well, as a partnership, they're not allowed to pay themselves a wage, so.

THE COURT: Correct.

THE WITNESS: So nothing shows up on the return, but obviously ----

THE COURT: Correct.

THE WITNESS: ---- they would want to receive compensation.

THE COURT: Okay.

THE WITNESS: So the total distribution, some of that would account for, um ----

THE COURT: A so-called salary.

THE WITNESS: ---- a so-called salary.

THE COURT: Okay.

THE WITNESS: And then the rest would be return on investment.

Husband's *only* response to Wife's argument regarding post-separation distributions is that she waived this issue by not raising it before the trial court because it was not listed in the pretrial order. Husband argues "[t]he only issue of post-separation partnership income that she claimed as divisible property was rental income from the parties' rental property. (R p 106)[.]" Husband contends that Wife cannot raise this issue on appeal because she "stipulated in the pre-trial order that there were no issues to be determined by the Court other than those listed, thereby effectively stipulating that there was no issue for the trial court to determine with regard to post-separation distributions."

We first note that the pre-trial order makes little mention of the Business or any related issues. And even if we assume for purposes of Husband's argument that Wife could have waived this issue by failing

to list it in a pretrial order, Husband's reliance upon the pretrial order here is inexplicable. This trial started with no pretrial order and *all* of the substantive evidence regarding the Business was presented before the pretrial order was entered. The first three days of the trial were in 2014 and evidence regarding the Business was presented on these dates. On the third day of the trial, 9 December 2014, the trial court realized that there was no pretrial order in the file and admonished the parties for the lack of a pretrial order:

> THE COURT: And the other thing, I-I need to verify. There is no pretrial order in this file.
>
> MR. JENNINGS: That is correct ----
>
> THE COURT: So ----
>
> MR. JENNINGS: ---- and I discussed that with you before we, um, before we started the ----
>
> THE COURT: And I understand about the business, but there's not anything with any of the other assets, but there is no reason that there's not a pretrial order in this file.
>
> MR. JENNINGS: And ----
>
> THE COURT: That needs to get done, because I'm not hearing anything on any blender pop pan car or any other item on any affidavit without a pretrial order.
>
> MR. JENNINGS: Okay.
>
> THE COURT: Okay?
>
> MR. JENNINGS: Yes, ma'am.
>
> THE COURT: I understand the business, because both of them listed it as unknown. I've got that. But I should still have a pretrial order with regards to all other assets and any other debts that they contend, and that needs to get done ----
>
> MR. JENNINGS: We did ----
>
> THE COURT: ---- because it's been ordered to be done moons ago.
>
> MR. JENNINGS: Excuse me. I understand.

THE COURT: I must have missed it, because otherwise I would probably already dismissed the case for non-compliance with the Court's orders, but I'm in it now and I hadn't done it. But, **I want a pretrial order** ----

MR. JENNINGS: Yes, ma'am.

THE COURT: **---- with every other item other than this business that's in contention**.

MR. JENNINGS: If I'm not mistaken, we did that before we started classification as far as put together a pretrial order ----

THE COURT: Okay.

MR. JENNINGS: ---- and had it available for Mr. Lackey. Um, he doesn't have it and Mr. Lackey and I, um, I don't know if you remember this, but I do because I know that I thought it was a real important point and I stuck it up there in the brain, uh, but, for whatever reason, I think we were ready, but you were saying that we were ready to go on this classification issue ----

THE COURT: Yes.

MR. JENNINGS: ---- (inaudible) let's get going

(inaudible).

THE COURT: Well, that was because that - I mean ----

MR. JENNINGS: And I understand.

THE COURT: ---- it needed to be done.

MR. JENNINGS: I hear you and I'll have - what I'm saying is that work's been done on my part.

THE COURT: Okay.

MR. JENNINGS: And I'll get with Mr. Lackey and we'll shore up what we need to.

(Emphasis added). The pretrial order was actually entered on 24 August 2015, prior to beginning the two days of the trial in 2015. During these two days, evidence regarding personal property was presented—not the substantive evidence about the Business or post-separation distributions

from the Business. The pretrial order was in compliance with the trial court's instructions above: it addressed "every other item other than this business that's in contention." Husband cannot rely upon waiver where the pretrial order was entered *after* presentation of all of the evidence on the Business, including distributions from the Business to the partners, and where the trial court directed that the pretrial order was to address only the items in contention *other* than the Business.

Thus turning back to Wife's argument, she contends the trial court erred by classifying all of the post-separation distributions as Husband's separate property because these payments are at least in part return on investment. Wife may be correct. In *Montague v. Montague*, the husband and wife formed a limited liability company to own and operate a commercial building. 238 N.C. App. 61, 64, 767 S.E.2d 71, 74 (2014). The trial court treated two post-separation distributions to the Husband as his separate property, characterizing them as "management fees" for his active management of the commercial building; this Court reversed and remanded:

> Wife contends that the trial court erred in treating two post-separation distributions made to Husband by the LLC as his separate property by characterizing these distributions as "management fees" he earned for managing the Montague Center after the parties separated. Specifically, the trial court treated as Husband's separate property a $5,010.00 distribution made to him in 2009 and a $26,200.00 distribution made to him in 2010. The key finding in the judgment with regard to these distributions states as follows:
>
> > 48. [Husband] actively manages the commercial property (negotiates all leases, collects rent payments, arranges for any "fit-up" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation. Plaintiff pays himself a management fee for this work in the form of a distribution.
>
> We agree with Wife that our holding in *Hill v. Hill*, ___ N.C. App. ___, 748 S.E.2d 352 (2013), compels us to conclude that the trial court should have classified these distributions as divisible property rather than treating them as Husband's separate property. As divisible property,

they must be distributed by the trial court. Accordingly, we reverse the trial court's classification of these distributions and remand the matter, directing the trial court to reclassify these distributions as divisible property and to make a distribution of this property.

In *Hill*, the parties set up a Subchapter S corporation as a vehicle for the wife's speech pathology practice. The corporate tax returns showed that the wife took money from her practice in two ways: (1) in the form of a low salary; and (2) in the form of shareholder distributions. Evidence was presented that she took shareholder distributions for the purpose of avoiding federal taxes for Social Security and Medicare. The trial court re-characterized the post-separation shareholder distributions to the wife as salary that she earned and, therefore, classified them as her separate property. On appeal, however, our Court reversed, stating that the parties are bound by their established methods of operating the corporation. Our Court essentially determined that since the parties elected to treat a portion of the money paid to the wife as shareholder distributions, rather than treating it as salary expenses of the corporation, these funds were part of the retained earnings of the corporation. Our Court then held that since the retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property, the wife was bound by the treatment of these shareholder distributions to her as divisible property.

In the present case, the LLC is taxed as a partnership. The two distributions to Husband at issue here are treated on the LLC's 2009 and 2010 federal tax returns as withdrawals of partnership capital, and not as expenses of the partnership for property management services. Therefore, these distributions were part of the capital of the LLC and, therefore, belonged to the LLC. Had the distributions been treated as "management fees" on the federal tax returns, they would have been LLC expenses, which would have reduced the LLC's net income for 2009 and 2010 by $31,210.00, which potentially would have reduced Wife's personal tax liability.

We note that Husband may have, in fact, earned these distributions as management fees; however, we are compelled by *Hill* to conclude that Husband, being the majority

> owner and a manager of the LLC, is "bound" by the manner in which these post-separation distributions to him were characterized on the LLC tax returns. Accordingly, we strike the trial court's finding that Husband was paid for his efforts in managing the LLC, reverse the portion of the judgment treating the post-separation distributions from the LLC to Husband as his separate property, and remand the matter to the trial court to classify them as divisible property and to distribute this property.

Montague, 238 N.C. App. at 64–66, 767 S.E.2d at 74–75 (citations, quotation marks, and brackets omitted).

Here, this Business is a partnership, and is required to file Form 1065, the U.S. Return of Partnership Income. Form 1065 is filed annually with the Internal Revenue Service for informational purposes only, in that any profits or losses are "passed through" to the general partners for taxation. A Schedule K-1 for each partner is filed with the 1065 to report the partners' shares of any income, losses, deductions, credits, and other relevant information. The partners use the information provided on the Schedule K-1 to prepare their individual income tax returns.

In the present case, the Business partnership returns for years 2009-2013, with accompanying Schedule K-1s, were introduced into evidence as Plaintiff's Exhibits 24-28. Partnership distributions to Husband and his father were characterized on the returns as follows:

		Self-Employment Earnings K-1, Line 1 or 14(A)		Capital Distributions K-1, Line 19	
Exhibit	Year	Husband	Joe	Husband	Joe
#24	2009	29,328.00	19,552.00	0	0
#25	2010	93,939.00	62,626.00	0	0
#26	2011	209,180.00	139,453.00	0	0
#27	2012	40,012.00	26,675.00	0	0
#28	2013	47,204.00	31,469.00	0	0

In addition, the returns reflect that no withdrawals or distributions were made from either Husband's or Joe's capital accounts.

The trial court found the Business made distributions to the Business partners that varied substantially from the figures reflected

on the Business partnership returns for these years. These figures were taken from Exhibit #5, the Blair Iron and Metal Valuation as of December 31, 2013, prepared by Ms. Fonvielle.[10] It is unclear from the Valuation whether the distributions are income to Husband and Joe, return of capital, or of another nature. However, the trial court found that the distributions were income, and thus Husband's separate property.

In accord with *Hill* and *Montague*, the parties are bound by the characterization of the distributions on the income tax returns. *See Montague*, 238 N.C. App. at 64-66, 767 S.E.2d at 74-75. While it is clear that a considerable portion of the post-separation distributions to Husband was self-employment income on which Husband was liable for income and self-employment taxes, the remaining distributions may or may not be a return of capital. Post-separation self-employment income would properly be classified as Husband's separate property, and a post-separation return of capital to Husband would be properly classified as divisible property which should be distributed by the court. Accordingly, we vacate the trial court's classification of the post-separation distributions to Husband as his separate property and remand for entry of an order classifying the distributions in accord with the nature of the distributions, with due regard for the classification of the distributions on the Business's partnership returns, and distributing them properly.

IV. Conclusion

We affirm the trial court's classification and valuation of the Husband's interest in a partnership with his father, but reverse the classification and distribution of the post-separation distributions from the partnership to Husband. We remand for entry of additional findings concerning the nature of the post-separation distributions to Husband and the proper classification, valuation, and, if appropriate, distribution of this property. In addition, the trial court may revise the overall distribution of the marital and divisible property as needed to equalize the distribution in response to any changes in classification and valuation.[11]

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10. As mentioned above, we do not have the consent order setting out the scope of Ms. Fonvielle's evaluation; we are assuming based upon the testimony that the main purpose of Ms. Fonvielle's evaluation was to value the Business and not necessarily to assist the trial court in the classification of the post-separation distributions to the partners.

11. The distribution of marital and divisible property on remand shall remain equal, since the trial court found in the order on appeal that "[n]either party contended in the pretrial order that other than an equal division of marital and divisible property is equitable, nor did either party produce evidence at trial to overcome the presumption that an equal division of marital and divisible property is equitable" and concluded that an equal distribution of marital and divisible property is equitable. Appellant has challenged this finding or conclusion on appeal.

On remand, the trial court may in its sole discretion hold a hearing and receive additional evidence as needed to address the issues on remand.

AFFIRMED in part; REVERSED in part; REMANDED.

Judges ZACHARY and ARROWOOD concur.

BARBARA BURGESS AS ADMINISTRATRIX OF THE ESTATE OF STEPHANIQUE BELL, PLAINTIFF
v.
RASHEKA RENEE SMITH, THOMAS CHEEK MARSHALL, CHICNYLYNN SOLUTIONS, INC., AND ANTHONY JOHNSON, DEFENDANTS

No. COA17-1352

Filed 7 August 2018

Jurisdiction—subject matter—challenged after default judgment—equitable doctrines—inapplicable

Where the trial court entered a default judgment against defendant in a wrongful death action and defendant subsequently challenged the trial court's subject matter jurisdiction by asserting that the matter was one of workers' compensation and jurisdiction lay exclusively with the N.C. Industrial Commission, the trial court erred by failing to resolve the jurisdiction issue and instead concluding that the doctrines of equitable estoppel and laches barred defendants from challenging its subject matter jurisdiction. The order denying defendant's postjudgment motions was vacated and remanded with instructions for the trial court to hold an evidentiary hearing to issue proper findings and conclusions determining its subject matter jurisdiction.

Appeal by defendant from order entered 9 June 2017 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 18 April 2018.

James W. Kirkpatrick, III, P.A., by James W. Kirkpatrick, III, for plaintiff-appellee.

The Turner Law Firm, by Richard W. Turner, Jr., for defendant-appellant Thomas Cheek Marshall.

ELMORE, Judge.

Plaintiff Barbara Burgess, as administratrix of the estate of her deceased daughter, Stephanique D. Bell, brought this wrongful death action in superior court asserting various negligence claims against defendants Rasheka Renee Smith; Thomas Cheek Marshall; Chicnyln[1] Solutions, Inc.; and Anthony Johnson.[2] Bell was killed in a single-vehicle car accident while riding as a passenger in a vehicle owned by Marshall that Smith was driving during the course and scope of her employment as a salesperson traveling from Tennessee to North Carolina to sell Chicnlyn Solutions cleaning products door-to-door for Marshall and Johnson. After defendants Smith and Marshall were served with the complaint and summons but failed to answer or appear, the superior court entered a $2,151,218.29 default judgment against them jointly and severally.

Five months later, Marshall filed his first responsive pleading, asserting for the first time that Bell was his employee and had been killed during the course and scope of her employment while traveling as part of a sales team with Smith. Relying on the exclusivity provision of our Workers' Compensation Act, *see* N.C. Gen. Stat. § 97-10.1, Marshall moved to stay proceedings to enforce the prior judgments, to set aside the entries of default and default judgment, and to dismiss Burgess's claims for want of subject-matter jurisdiction, on the grounds that jurisdiction lies exclusively within the North Carolina Industrial Commission ("NCIC"). After a hearing, the superior court denied Marshall's postjudgment motions and affirmed its default judgment. Rather than issue findings and conclusions determining its jurisdiction, however, the superior court concluded that the doctrines of equitable estoppel and laches barred Marshall from challenging its subject-matter jurisdiction on the basis that Bell was his employee. Marshall appeals, arguing the superior court erred in several respects.

Because subject-matter jurisdiction may be challenged at any time, Marshall was permitted to challenge the superior court's jurisdiction over the subject matter of Burgess's claims against him even for the first time months after the default judgment was entered. Additionally, because subject-matter jurisdiction is a legal matter independent of

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1. Although the complaint names "Chicnlyn Solutions, Inc." elsewhere in the record the business is named "Chicnlynn" or "Chicnylynn" Solutions. We use "Chicnlyn" throughout this opinion.

2. Marshall is the only defendant in this appeal.

parties' conduct, the doctrines of equitable estoppel or laches provided no basis for the superior court to refuse to resolve the jurisdictional challenge. We therefore vacate the superior court's order denying Marshall's postjudgment motions, and remand with instructions for the superior court to hold a hearing in order to issue proper findings and conclusions determining its jurisdiction.

If after the hearing on remand, the superior court determines it had jurisdiction, it may properly deny Marshall's postjudgment motions and its prior judgments against him may be sustained. If the superior court determines jurisdiction lies exclusively with the NCIC, it must set aside its prior judgments against Marshall as void and dismiss Burgess's claims against Marshall for want of subject-matter jurisdiction. In such an event, Burgess may refile her claim against Marshall in the NCIC. We note that while ordinarily an employer may raise the two-year filing requirement imposed by N.C. Gen. Stat. § 97-24 as an affirmative defense to an employee's untimely filed workers' compensation claim, based upon the allegations of employer fault causing the delay in this case, if Marshall attempts to raise this defense, Burgess may properly reassert the affirmative defense of equitable estoppel, as she successfully pled in the superior court. If the superior court determines jurisdiction properly lies in the South Carolina Industrial Commission ("SCIC"), Burgess may file her claim in the SCIC, and we encourage that commission to deem as waived any potential filing defense Marshall may raise.

I. Background

According to Burgess's complaint, on 2 June 2013, Bell was riding as a passenger in Marshall's 1999 Ford SUV, which Smith was driving eastbound on I-40 during the course and scope of her employment with Marshall, Johnson, and Chicnlyn Solutions. Around 8:00 a.m., the vehicle hydroplaned, ran off the road, struck a metal guardrail, and rolled over several times in Haywood County. Tragically, Bell was ejected from the vehicle, sustained fatal injuries in the crash, and died at the scene.

On 7 May 2015, Bell's mother, Burgess, in her capacity as administratrix of Bell's estate, filed a wrongful death action in the superior court asserting various negligence claims against Smith, Marshall, Johnson, and Chicnlyn Solutions. Burgess was unable to serve Johnson or Chicnlyn Solutions with the complaint and summons but secured service on Smith and Marshall. After Smith and Marshall failed to answer or appear, the superior court clerk entered default against Marshall and Smith on 30 July 2015 and 14 July 2016, respectively. On 21 July 2016, after Marshall and Smith again failed to appear, the superior court

judge entered a $2,151,218.29 default judgment against them jointly and severally.

About five months later, on 16 December 2016, Marshall filed his first responsive pleadings and an affidavit. In a filing styled "notice of motion and motion to stay, to dismiss, and for relief from judgment/order," Marshall moved to stay proceedings to enforce all prior judgments, N.C. Gen. Stat. § 1A-1, Rule 62(b) (2015); to dismiss Burgess's claims for lack of subject-matter jurisdiction, *id.* § 1A-1, Rule 12(h)(3) (2015); and to set aside the default and default judgment entered against him, *id.* § 1A-1, Rules 55(d), 60(b)(1), -(3), -(4), -(6) (2015). In a filing styled "motion, answer, and defenses," Marshall relied on the exclusivity provision of our Workers' Compensation Act, *id.* § 97-10.1 (2015), to move to dismiss Burgess's claims against him for lack of subject-matter jurisdiction, *id.* § 1A-1, Rule 12(b)(1), -(b)(6), -(h)(3) (2015).

In the attached affidavit, Marshall averred, for the first time, that Bell was his employee and her death arose out of the course and scope of her employment as a salesperson traveling from Tennessee to North Carolina on a sales team with Smith for the purpose of selling cleaning products door-to-door in Charlotte. According to Marshall's affidavit, "in June 2013 [he] was operating a business utilizing salespersons to sell cleaning products door to door," as well as "[a] sales crew [that] consisted of sales managers, secretaries, and salespersons." Marshall "provide[d] transportation and lodging for the sales crew" and "all product for the salespersons to sell." Marshall further alleged that "[s]alespersons were typically recruited by print advertising," "Bell[ ] responded to a print advertising," he "provided sales training to . . . Bell . . . in early 2013," and "[o]n the date of the accident, . . . Bell was part of a sales crew which worked in Tennessee and was traveling to Charlotte[.] . . ." Thus, Marshall argued, Burgess "improperly brought this matter in Superior Court" because the NCIC "is vested with exclusive jurisdiction to determine the rights and benefits between employers and employees for personal injury or death."

In response, on 8 May 2017, Burgess moved for the superior court to deny Marshall's postjudgment motions, in relevant part pleading the affirmative defenses of equitable estoppel and laches. Burgess attached to her motion, *inter alia*, an affidavit from her attorney, James W. Gilchrist, Jr., in which Gilchrist averred that Marshall on 14 August 2013 "informed [him] that 'the kids' were not employees at the time of the accident" but, rather, "were all independent contractors associated with Anthony Johnson and Chicnylynn Solutions[.] . . ." Thus, Burgess argued, Marshall's three-and-a-half year delay after the date of the car accident

in claiming that Bell was his employee and thus the proper forum for her action was in the NCIC, should be barred by laches since that delay precluded Burgess "from making a claim with the [NCIC] based on N.C. Gen. Stat. § 97-58, which requires that any claim being made with the [NCIC] to be made within two years of the incident giving rise to the claim." Further, Burgess argued, Marshall should be equitably estopped from defensively asserting Bell was his employee to support his motion to dismiss her claims for lack of subject-matter jurisdiction, since Burgess relied upon Marshall's prior contrary statement to her attorney in "fil[ing] suit in Haywood County Superior Court instead of a workers' compensation claim with the [NCIC] or [SCIC]" and permitting Marshall to "rais[e] the defense . . . at this time would preclude her Estate from any recovery under the Rules of the [NCIC] . . . ."

After a hearing, the superior court entered an order on 9 June 2017 denying Marshall's postjudgment motions and affirming its default judgment. In relevant part, the superior court concluded (1) Marshall was equitably estopped from defensively raising the exclusivity provision of our Workers' Compensation Act as a jurisdictional bar to Burgess's claims against him based on his prior contrary extrajudicial statement that Bell was not his employee but an independent contractor, and (2) laches from the delay barred Marshall from now challenging its subject-matter jurisdiction on the basis that Bell was his employee and her death arose during the course and scope of her employment. Marshall appeals.

II. Analysis

On appeal, Marshall argues the superior court erred by not declaring (1) Bell was his employee and her death arose during the course and scope of her employment, and thus (2) it lacked subject-matter jurisdiction over Burgess's claims based upon the exclusivity provision of the Workers' Compensation Act. Marshall also argues the superior court erred by concluding (3) Burgess was entitled to the defense of equitable estoppel because Burgess failed to exercise reasonable care and circumspection in discovering Bell's employment status, and (4) his Rule 12 defenses grounded in his challenge to the superior court's subject-matter jurisdiction were barred by laches because, based on Burgess's own delay in filing her action in superior court days before the expiration of the two-year statute of limitation period applicable to wrongful death claims, no causal link existed between his delayed answer and defenses, and Burgess's loss of her potential workers' compensation claim pursuant to N.C. Gen. Stat. § 97-24's two-year filing requirement. Finally, Marshall argues, (5) the superior court erred by denying

his postjudgment motions for relief and to dismiss Burgess's claims because it lacked subject-matter jurisdiction.

However, because we resolve this appeal on the ground that the superior court erred in failing to resolve Marshall's challenge to its subject-matter jurisdiction, we address the merits of Marshall's arguments only to the extent they implicate our analysis of this threshold jurisdictional issue.

A. Review Standard

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012) (quoting *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)).

B. Subject-Matter Jurisdiction

Superior courts "ha[ve] jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute." *Morse v. Curtis*, 276 N.C. 371, 375, 172 S.E.2d 495, 498 (1970) (citing N.C. Const. art. IV, § 2; other citations omitted). "By statute the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the Work[er]'s Compensation Act." *Id.* (citations omitted); *see also* N.C. Gen. Stat. § 97-10.1 ("If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies . . . as against the employer at common law or otherwise on account of such injury or death.").

Subject-matter "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953)). Thus, a challenge to subject-matter jurisdiction, *see* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), -(h)(3), may be raised at any time, even months after entry of a default judgment, *see In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793 ("[L]itigants . . . may challenge 'jurisdiction over the subject matter . . . at any stage of the proceedings, even after judgment.' " (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961)); *see also Miller v. Roberts*, 212 N.C. 126, 129, 193 S.E. 286, 288 (1937) ("There can be no waiver of [subject-matter] jurisdiction, and objection may be made at any time." (citations omitted)). Additionally, a party by his or her conduct can neither be equitably estopped nor barred by laches from challenging subject-matter

jurisdiction, nor can these equitable doctrines vest jurisdiction. *See In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793 ("Subject[-]matter jurisdiction 'cannot be conferred upon a court by . . . waiver or estoppel[.] . . .' " (quoting *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967))).

Where a party challenges the superior court's subject-matter jurisdiction pursuant to the exclusivity provision of our Workers' Compensation Act, "the proper procedure" for the superior court is to "ma[k]e findings of fact and conclusions of law resolving the issue." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)); *see also Morse*, 276 N.C. at 377, 172 S.E.2d at 499 (noting the superior court "follow[ed] the proper *procedure* in determining the [defendant-employer's] pleas in bar [that the plaintiff-employee's superior court action for personal injury was barred by the exclusivity provision of our Workers' Compensation Act] by hearing evidence offered by the parties, finding facts[and] reaching conclusions of law, . . . to determine its jurisdiction").

Where the superior court enters an order omitting findings and conclusions necessary to resolve a legitimate subject-matter jurisdiction challenge, the proper procedure for the reviewing court is to vacate that order and remand with instructions for the superior court to hold a hearing in order to issue proper findings and conclusions resolving the jurisdictional matter. *See Burns v. Riddle*, 265 N.C. 705, 706–07, 144 S.E.2d 847, 849 (1965) (vacating superior court's order summarily affirming the NCIC's jurisdictional findings and remanding to the superior court with instructions to hold a hearing in order to issue its own "independent findings as to the determinative jurisdictional facts").

Here, after Marshall filed his postjudgment motions to stay proceedings to enforce the judgments entered against him, for relief from those prior judgments, and to dismiss Burgess's claims for want of subject-matter jurisdiction, based upon the exclusivity provision of our Workers' Compensation Act, the superior court held a hearing and entered an order denying the motions and affirming its prior default judgment. In its order, the superior court entered the following factual findings:

> 1. . . . [Bell] died in an automobile accident on June 2, 2013, in Haywood County, . . . when she was a passenger in a vehicle owned by . . . Marshall;
>
> 2. . . . Burgess, the natural mother of . . . Bell, filed a wrongful death action as the Administrator of the Estate

of . . . Bell in the Haywood County Superior Court on May 7, 2015;

3. . . . Marshall was properly served with the Summons and Complaint on May 15, 2015;

4. . . . [W]hen . . . Marshall failed to respond or otherwise move, [Burgess] filed a Motion and Affidavit to Enter Default on July 30, 2015, and default was entered against [Marshall];

5. . . . [A] Motion for Default Judgment was filed on May 20, 2016 and default was entered against . . . [Marshall] on July 18, 2016, with notice of said motion and of the hearing date for said motion being provided to . . . Marshall on May 26, 2016;

6. . . . Marshall failed to file any response to either [Burgess's] Complaint or to her motion for default judgment until he filed an Answer, Motion to Stay, Motion for Dismissal, and Motion for Relief from Judgment on . . . December 14, 2016;

7. . . . [I]t was not until December 14, 2016, that . . . Marshall chose to proffer a defense of lack of subject matter jurisdiction, based on his claim that [Bell] . . . was his employee[.] . . ;

8. . . . [T]he claim of a defense of lack of subject[-]matter jurisdiction was not made until approximately three-and-a-half years after . . . [Bell's] death . . . when, in . . . Marshall's Motion to Stay, to Dismiss and for Relief from Judgment, he asserted that the [NCIC] had exclusive jurisdiction between employers and employees, and indicated for the first time since the accident that he was . . . [Bell's] employer . . . [;]

9. Prior to the filing of . . . Marshall's Motion to Stay, to Dismiss and for Relief from Judgment, during the course of [Burgess's] investigation into this matter, . . . Marshall had consistently alleged, in his conversations with [Bell's] stepfather, Daniel Holmes, and with [Burgess's] Attorney, James W. Gilchrist, Jr., . . . that [Bell] was not [his] employee . . . at the time of the accident but . . . was an independent contractor associated with Defendants Johnson and Chicnylynn Solutions. Further, the Court

> finds that . . . Marshall gave false and misleading information to [Burgess's] representatives as to this very serious matter[;]
>
> 10. Despite [Marshall]'s assertion in his Motion to Stay, to Dismiss and for Relief from Judgment that [Bell] was in an employee-employer relationship on the date of the accident, [Marshall] admitted that he had no Workers' Compensation insurance in place on that date[; and]
>
> 11. . . . [A]ny workers' compensation claim that [Bell] may have had is barred by the two year statute of limitation under N.C. Gen. Stat. § 97-58.

Based on these findings, the superior court concluded in relevant part:

> 2. . . . Marshall is equitably estopped from asserting that this Court does not have subject[-]matter jurisdiction of this action on the grounds that [Bell] was an employee of his so that the proper forum was the [NCIC];
>
> 3. . . . [T]he affirmative defense of laches applies to completely bar . . . Marshall from asserting that [Bell] was his employee and that this court did not have subject matter jurisdiction over this action[.]

As reflected, although Marshall lodged a legitimate challenge to the superior court's jurisdiction over the subject matter of Burgess's claims against him, the superior court failed to follow the proper procedure by issuing findings and conclusions determining its jurisdiction. Because subject-matter jurisdiction may be challenged even months after a default judgment is entered, *In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793, and because a court has the judicial duty to determine its jurisdiction, the superior court erred in refusing to resolve the matter. Additionally, because "[j]urisdiction rests upon the law . . . alone[and] is never dependent upon the conduct of the parties," *id.* (quoting *Feldman*, 236 N.C. at 734, 73 S.E.2d at 867), the doctrines of equitable estoppel and laches are irrelevant to issues of subject-matter jurisdiction, and the superior court improperly relied thereupon in refusing to resolve Marshall's jurisdictional challenge.

As a secondary matter, we note the superior court's reasoning in applying those equitable doctrines appears to have been made under a misapprehension of the law—that is, the superior court's determination that "any workers' compensation claim that Decedent may have had is barred by the two year statute of limitation under N.C. Gen. Stat.

§ 97-[24].”[3] Section 97-24’s two-year filing requirement is not a statute of limitation but merely a condition precedent to compensation under the Workers’ Compensation Act. *See Gore v. Myrtle/Mueller*, 362 N.C. 27, 38, 653 S.E.2d 400, 408 (2007) (“[W]e underscore that the two[-]year limitation in N.C.G.S. § 97-24 has repeatedly been held to be a condition precedent to the right to compensation and not a statute of limitations.” (citation omitted)). Thus, while ordinarily an employer may defensively assert that an employee’s failure to file a claim in the NCIC within two years after the accident procedurally bars that claim, where, as here, employer fault caused the delay, equitable estoppel may apply to waive the employer’s defense, rendering section 97-24’s two-year filing requirement no bar to the untimely filed workers’ compensation claim. *Id.* (“[A] condition precedent, unlike subject[-]matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct. Therefore, by their actions, defendant[-employers] could waive the two[-]year condition precedent laid out in N.C.G.S. § 97-24.” (internal citations omitted)); *see also id.* at 36, 653 S.E.2d at 406 (“[E]stoppel may be invoked to prevent the employer from asserting the time limitation in N.C.G.S. § 97-24 as an affirmative defense. . . . [E]mployer fault, regardless of whether it is intentional, will excuse the untimely filing of a workers’ compensation claim.” (citations omitted)).

Because the superior court failed to follow the proper procedure in issuing findings and conclusions resolving whether it or the NCIC had jurisdiction over the subject matter of Burgess’s claims against Marshall, we vacate its order denying Marshall’s postjudgment motions and remand the case with instructions for the superior court to hold an evidentiary hearing in order to issue proper findings and conclusions determining its jurisdiction, *see Burns*, 265 N.C. at 707, 144 S.E.2d at 849, including resolving Bell’s employment status, *see McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (“[T]he existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact.” (citing *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988))); *see also Lemmerman*, 318 N.C. at 579, 350 S.E.2d at 85 (“[T]he question of whether plaintiff . . . was defendant’s employee as defined by the Act is clearly jurisdictional.”), and any

3. Although Burgess in her motion and the superior court in its order cited to section 97-58, that statute governs the time limit for filing a claim for occupational disease. *See* N.C. Gen. Stat. § 97-58 (2015). Nonetheless, the more applicable statute here governing the time limit for filing a claim alleging a work-related injury by accident imposes the same two-year filing requirement. *See* N.C. Gen. Stat. § 97-24 (2015) (“The right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission . . . within two years after the accident . . . .”).

other jurisdictional facts relevant to whether Burgess's superior court claims against Marshall were barred by our Workers' Compensation Act. *See*, *e.g.*, N.C. Gen. Stat. § 97-10.1; *id.* § 97-13(b) (2015) (excluding from the Act an employer "that has regularly in service less than three employees in the same business within this State[.] . . ."); *Young v. Mayland Mica Co.*, 212 N.C. 243, 244, 193 S.E. 285, 285 (1937) ("[T]he number of employees regularly in service in the business of the defendant in this state. . . . is a jurisdictional fact which the superior court has the duty and power to find." (citation omitted)); *see also Bowden v. Young*, 239 N.C. App. 287, 290, 768 S.E.2d 622, 625 (2015) ("[I]ntentional torts generally fall outside the scope of the Workers' Compensation Act." (citing *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991)). We further note that the record is unclear whether, if the superior court lacked subject-matter jurisdiction, the proper forum for Burgess's claim against Marshall would be in the NCIC or the SCIC.

After the hearing on remand, if the superior court determines it had jurisdiction, it may properly deny Marshall's postjudgment motions and its default judgment may be sustained. However, if the superior court determines jurisdiction lies with the NCIC or SCIC, its prior judgments against Marshall must be vacated and Burgess's claims must be dismissed for want of subject-matter jurisdiction. If Burgess is required to file her claim against Marshall in the NCIC, although N.C. Gen. Stat. § 97-24's two-year filing period will have expired, if needed, based upon the record before us, Burgess may properly raise the affirmative defense that Marshall's conduct in causing the delay equitably estops him from relying on that filing requirement as a procedural bar. If Burgess is required to file her claim in the SCIC, we encourage that commission also to consider any potential filing-period defense Marshall may raise under S.C. Code. § 42-15-40 (2015) (requiring an employee to file a claim in the SCIC within two years after the accident) similarly waived by Marshall's conduct in this case. *See*, *e.g.*, *Lovell v. C. A. Timbes*, *Inc.*, 263 S.C. 384, 388, 210 S.E.2d 610, 612 (1974) ("Section 72-303[, now recodified at section 42-15-40,] is a statute of limitation and . . . compliance with its provisions may be waived by the employer or its insurance carrier or they may become estopped by their conduct from asserting the statute as a defense.").

III. Conclusion

Because Marshall was permitted to challenge the superior court's subject-matter jurisdiction even for the first time months after the default judgment was entered against him, and because a party's conduct is wholly irrelevant to subject-matter jurisdiction, the superior

court erred by refusing to resolve the matter on the basis that Marshall was barred by equitable estoppel and laches from challenging its subject-matter jurisdiction. As the superior court failed to follow the proper procedure in issuing findings and conclusions to determine its jurisdiction, and the record lacks the necessary information to meaningfully consider Marshall's jurisdictional challenge, we vacate the superior court's order denying Marshall's postjudgment motions. We remand the case with instructions for the superior court to hold an evidentiary hearing in order for it to issue proper findings and conclusions relevant to determine its subject-matter jurisdiction.

After the remand hearing, if the superior court determines it had jurisdiction, it may properly deny Marshall's postjudgment motions and its default judgment may be sustained. If the superior court determines elsewise, it must vacate its prior judgments entered against Marshall and dismiss Burgess's claims against him for want of jurisdiction. If Burgess must file her claim against Marshall in the NCIC, under the circumstances of this case, we instruct that commission not to apply section 97-24 two-year filing requirement as a procedural bar to Burgess's claim. If Burgess must refile her claim in the SCIC, we encourage that commission to deem any potential filing defense Marshall may raise as waived.

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
JAY BUTMATAJI, LLC; BYRD, BYRD, ERVIN, MCMAHON & DENTON, P.A., TRUSTEE; MUKTI, INC., BB&T COLLATERAL SERVICE CORPORATION, TRUSTEE, AND BRANCH BANKING AND TRUST COMPANY, DEFENDANTS

No. COA17-689

Filed 7 August 2018

Eminent Domain—temporary construction easement—motion in limine—damages—interference during construction

In a condemnation action to determine the value of a temporary construction easement taken as part of a highway-widening project, the trial court did not abuse its discretion in limiting the scope of expert testimony by the hotel owner's appraiser by excluding testimony about lost business profits. Evidence of noncompensable losses is not admissible, and damages for temporary takings include the rental value of the land actually occupied by the condemnor, but not interference with the business income for the entire property. Further, portions of the appraiser's opinion were based on assumptions that did not reflect actual construction conditions.

Appeal by defendant Jay Butmataji LLC from judgment entered 10 October 2016 by Judge W. Robert Bell in Superior Court, Burke County. Heard in the Court of Appeals 11 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Andrew J. Howell, for defendant-appellant Jay Butmataji LLC.

STROUD, Judge.

Defendant appeals the trial court's judgment awarding him $150,000 as just compensation for the taking of his property by the Department of Transportation. Because the trial court did not abuse its discretion in excluding portions of defendant's appraiser's testimony and appraisal report which valued the taking of a temporary construction easement assuming conditions during construction which did not exist, we affirm.

I. Background

On 10 May 2011, plaintiff Department of Transportation ("DOT") instituted this action against defendant landowner Jay Butmataji LLC, trustees, and Branch Banking and Trust Company.[1] DOT had condemned and appropriated a portion of defendant's property in Burke County upon which it operated a motel. DOT took 0.184 acres of defendant's 3.573 acres of property. DOT described the taking as a temporary construction easement ("TCE") to widen a highway.[2] Defendant Butmataji answered DOT's complaint and requested a jury trial to determine just compensation for the taking.

Before the trial, DOT made a motion in limine requesting the trial court

> to instruct all parties, their counsel, and witnesses not to mention state, or intimate any of the matters listed below by statement, question, or argument in the presence of the jury or the jury panel without first approaching the Court of the hearing of the jury and securing a ruling regarding the same[.]

In its motion, DOT listed several matters subject to the motion in limine. Before trial began, on 9 August 2016, the trial court considered the motion in limine and the parties addressed at length their contentions about the appropriate evidence for the jury to consider.

Defendant owned and operated a motel on the property and contended ingress and egress to his business was limited by the TCE during the construction of the road. The State argued that the appraisal prepared by Mr. Damon Bidencope, defendant's expert witness, included valuation of loss of income to the motel and elements of damages not supported by the actual conditions of the property during construction. The State argued, "[C]ases are very clear, that you are not allowed loss of rent. It's only the rent of that particular piece of the easement, not loss of rent from your business, even though this is a motel, Your Honor. You're just not allowed. It's very, very clear." Defendant's attorney countered,

> [W]e're entitled to present evidence through Mr. Bidencope and through our witnesses of the effect that this temporary

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1. Only defendant Jay Butmataji LLC appeals so it is the singular "defendant" we refer to in this case.

2. DOT also took an easement in perpetuity for drainage, which is not at issue in this case.

> construction easement had on the remainder of the property, because that's what the law says we can do.
>
> . . . .
>
> So we contend we're wholly entitled to put on that evidence and that Mr. Bidencope's appraisal addresses that in a[n] accurate manner. Now, if they want to take Mr. Bidenquote -- cope on voir dire and address it at that time, that's fine, Your Honor. But we wholly don't think you should exclude it at this time in any limited phase.

Mr. Bidencope then testified at length on voir dire.

The trial court granted the State's motion in limine in part and excluded the portion of Mr. Bidencope's appraisal entitled "Building Rent Lost During TCE[,]" approximately two to three pages of the 91 page appraisal.[3] The trial court later clarified its ruling for defendant as follows: "He can testify as to the [a]ffect of the TCE on the remainder of the property, but not as to the taking of the entryway." The only question before the jury was the amount of just compensation defendant should receive. The jury determined damages of $150,000.00, and the trial court entered judgment accordingly. Defendant appeals.

II. Exclusion of Testimony

Defendant's only argument on appeal is that "the trial court erred in granting plaintiff DOT's motion in limine to exclude defendant landowner's expert appraiser Damon Bidencope's testimony concerning the effects of the temporary construction easement on the remainder of the defendant landowner's property." (Original in all caps.) "The standard of review for a trial court's ruling on a motion in limine is abuse of discretion." *Kearney v. Bolling*, 242 N.C. App. 67, 78, 774 S.E.2d 841, 849 (2015), *disc. review denied*, ___ N.C. ___, 783 S.E.2d 497 (2016). "A trial court abuses its discretion where its ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *City of Charlotte v. Combs*, 216 N.C. App. 258, 262, 719 S.E.2d 59, 63 (2011) (citation and quotation marks omitted).

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3. Defendant's counsel noted that removing this portion of the appraisal would also have an effect on other portions of the appraisal, since "information about the TCE coming across the access and having an effect on the remainder of the property is not only found on pages 85 through 86; it effects an analysis of the other portions of his report and the other damages that he's gone through in his report." The trial court required Mr. Bidencope to revise his appraisal to remove the excluded portions. Defendant presented a full proffer of evidence of Mr. Bidencope on voir dire and reserved his objection to the modifications to the appraisal report.

Defendant's argument focuses on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) and Rule 702 of the Rules of Evidence regarding an expert witness's qualification to testify; defendant argues "the trial court's ruling was, in effect, a determination that Mr. Bidencope's testimony on the TCE's effect on the remainder of the property was not admissible expert testimony." But defendant misconstrues the trial court's ruling. Mr. Bidencope was not excluded as an expert witness, and he actually testified at length to the jury about the portions of the appraisal not at issue here. Defendant's argument stresses Mr. Bidencope's qualifications and his methodology, but there was really no question as to his qualifications and no question that he used recognized methodologies in valuing the property generally. Defendant's argument assumes that once a witness has been properly qualified as an expert, he may testify to anything within his expertise, but that is simply not the case. Neither experts nor lay witnesses may testify unfettered by the rules of evidence and law applicable to the subject of their testimony. Furthermore, in condemnation cases, the trial court must also consider whether the appraiser's opinion is based upon the correct factual basis and whether the appraisal is based upon any element of damages not considered as a proper consideration for that type of case. *See Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006) ("An opinion concerning property's fair market value must not rely in material degree on factors that cannot legally be considered.").

From reviewing the transcript of the voir dire, arguments, and colloquy with the trial court, it appears the trial court's concern focused on two aspects of the appraisal. First, Mr. Bidencope valued the "Building Rent Lost During TCE" on the assumption that the actual physical access to the motel was cut off or may be cut off at any time during the 5.1 year period of the construction project. Second, Mr. Bidencope used the loss of income from rental of rooms during the TCE as a portion of his opinion of damages.

Defendant's argument conflates the measure of damages for the permanent partial taking -- the portion of the property which was taken -- with the damages for the temporary construction easement -- damages arising from the actual construction period. For the permanent partial taking, just compensation is based upon the fair market value of the property just before the taking as compared to the value immediately after the taking, assuming the project has been completed as designed. *See Barnes v. Highway Commission*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) ("When the property is appropriated by the State

Highway Commission for highway purposes, the measure of damages is the difference between the fair market value of the entire tract of land immediately before the taking and the fair market value of what is left immediately after the taking."). In other words, damages are based upon a legal fiction that the project as planned has been completed immediately after the condemnor acquires the property. *See generally id*. The highest and best use and fair market value of the property in its condition immediately before the taking is compared to the highest and best use and fair market value of the remainder immediately after the taking as if the project were complete. *See generally Barnes*, 250 N.C. 378, 109 S.E.2d 219. This measure of damages skips over the construction period, if any, and any temporary interference with use of the remaining property during construction. The interference with the property during construction is compensable, but the method of valuation is a bit different. *See generally Combs*, 216 N.C. App. at 261-62, 719 S.E.2d at 62-63.

The *only* valuation issue in this case is for the temporary construction easement, so the law regarding valuation for a permanent partial taking does not apply. Damages for the temporary construction easement are based upon the same general principles of valuation as for the permanent taking, but the legal fiction of immediate completion of the project does not apply; this measure of damages considers interference with the property's use *during* the construction, but not the impact of the project as completed on the remaining property's value as a whole. *See generally id*. This Court summarized the law regarding the measure of damages for a temporary taking of a construction easement in *Combs*:

> A temporary taking, which denies a landowner all use of his or her property for a finite period, is no different in kind from a permanent taking, and requires just compensation for the use of the land during the period of the taking.
>
> Generally, the measure of damages for a temporary taking is the rental value *of the land actually occupied* by the condemnor. *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 170, 43 S.E. 632, 633 (1903); *accord Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 93 L. Ed. 1765, 1773 (1949) (concluding that the proper measure of compensation for temporary taking is the rental that probably could have been obtained); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) (explaining that when the Government takes property only for a period of years, it essentially takes a leasehold in the

> property, and thus, the value of the taking is what rental the marketplace would have yielded for the property taken; *State v. Sun Oil Co.*, 160 N.J. Super. 513, 527, 390 A.2d 661, 668 (1978) (holding that where a temporary construction easement is taken, the *rental value of the property taken is the normal measure of damages and is awarded for the period taken*)[.]
>
> Where, as here, the temporary taking is in the form of a temporary construction easement, our Supreme Court has held that, in addition to paying the fair rental value of the easement area for the time used by the condemnor, the condemnor is liable for *additional elements of damages flowing from the use of the temporary construction easement*, which may include: (1) the cost of removal of the landowner's improvements from the construction easement that are paid by landowner; (2) the cost of constructing an alternate entrance to the property; (3) the changes made in the area resulting from the use of the easement that affect the value of the area in the easement or the value of the remaining property of the landowner; (4) the removal of trees, crops, or improvements from the area in the easement by the condemnor; and (5) the length of time the easement was used by the condemnor. *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 107, 310 S.E.2d 338, 346 (1984); *see also* 26 Am. Jur.2d *Eminent Domain* § 283 (Where land has been appropriated for a temporary use, the measure of compensation *is the fair productive value of the property during the time in which it is held*. More specifically, the rental value during the period of the taking, together with any damage sustained by the property, may be awarded as full compensation.

Id. at 261-62, 719 S.E.2d at 62-63 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted).

The trial court excluded evidence of loss of motel income during the construction period. Defendant contends the jury should have been allowed to consider "the interference with motel occupancy identified by Mr. Bidencope in his original appraisal report includ[ing] interference with access but also interference with ingress and egress, interference with parking, interference with walk-in revenue, and construction noise." Defendant cites to *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 104, 310 S.E.2d 338, 344 (1984), to argue that

loss of income is an "additional element[] of damage[,]" but the law simply does not support *that* type of damage. *See Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6–10, 637 S.E.2d 885, 890-93 (2006).

In a section entitled, "ADMISSIBILITY OF LOST BUSINESS PROFITS EVIDENCE[,]" our Supreme Court explained that in a partial taking such as this, a landowner's loss of business income is not admissible evidence. *Id.* Although the Court was addressing valuation of the remainder of the land after a partial permanent taking, these same principles regarding loss of business profits would apply to valuation of a temporary construction easement:

> During a proceeding to determine just compensation in a partial taking, the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of property and the diminution in value caused by condemnation. Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may confuse the minds of the jury, and should be excluded. *In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible.*
>
> *Injury to a business, including lost profits, is one such noncompensable loss. It is important to note that revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property.* This case is concerned with lost business profits. When evidence of income is used to valuate property, care must be taken to distinguish between income from the property and income from the business conducted on the property. . . .
>
> The longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions, as this Court articulated in *Pemberton v. City of Greensboro*, 208 N.C. 466, 470–72, 181 S.E. 258, 260–61 (1935). . . .
>
> . . . .
>
> Just compensation is not the value to the owner for his particular purposes. Awarding damages for lost profits would provide excess compensation for a successful business owner while a less prosperous one or an individual landowner without a business would receive less money for the same taking. Indeed, if business revenues

were considered in determining land values, an owner whose business is losing money could receive less than the land is worth. Limiting damages to the fair market value of the land prevents unequal treatment based upon the use of the real estate at the time of condemnation. Further, paying business owners for lost business profits in a partial taking results in inequitable treatment of the business owner whose entire property is taken, in which case lost profits clearly are not considered.

Evidence of lost business profits is impermissible because recovery of the same is not allowed. Additionally, the speculative nature of profits makes them improper bases for condemnation awards as they

> depend on too many contingencies to be accepted as evidence of the usable value of the property upon which the business is carried on. Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the community of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit, another might only do at a loss. Further, even if the owner has made profits from the business in the past it does not necessarily follow that these profits will continue in the future.

Recognizing that profits can rarely be traced to a single factor, business executives rely on complex models to determine profitability. Further, the uncertain character of lost business profits evidence could burden taxpayers with inflated jury awards bearing little relationship to the condemned land's fair market value.

Moreover, our well-established North Carolina rule prohibiting lost business profits evidence comports with the federal rule.

. . . .

In summary, the prevailing rule excluding lost business profits evidence in condemnation actions is firmly rooted in our jurisprudence. As a case that comprehensively discussed and applied this enduring rule, Pemberton provides the framework upon which we base our decision today.

Id. (emphasis added) (citations, quotation marks, and footnotes omitted).

Turning back to Mr. Bidencope's excluded testimony and evidence, a motel's business is renting rooms, so its business income is derived from rent, but the proper measure of damages is the rental value of the property actually taken—not the interference with the business income for the entire property. *See Combs*, 216 N.C. App. at 261, 719 S.E.2d at 62 ("[T]he measure of damages for a temporary taking is the rental value of the land actually occupied by the condemnor.") The distinction between damages for the property taken and business income for the entire property may be more obvious in a situation where access was entirely blocked for a period of time and the motel could not operate at all; the landowner would be entitled to the rental value of the land for its use as a motel, *but not* the business income that particular motel may have generated if it had been in operation. *See generally id.* at 261-62, 719 S.E.2d at 62-63. Here, the "land actually occupied" for the TCE was 0.184 acres of defendant's 3.573 acres, so the rental value of the 0.184 acres would be a proper element of the damages.[4] *Id.*

Furthermore, based upon the transcript, Mr. Bidencope assumed that access to the motel was entirely blocked at least part of the time during construction, but the evidence showed that access was never blocked; he also stressed that DOT *could* have blocked the access at any time, so access was uncertain. It is true that DOT *could* have blocked the access, but it did not. Although the access was less convenient due to the construction project, it was open. To this extent, Mr. Bidencope's valuation was not based upon the actual conditions on the property.[5]

Also, Mr. Bidencope's appraisal seemed to consider the effect of the construction on the fair market value of the property as if it were being valued for sale *during* the construction. One portion of the appraisal stated:

> The motel's ability to function is affected due to the uncertainty and possible disturbance of ingress and egress during this period. A potential buyer or tenant operator

4. Mr. Bidencope's appraisal and testimony addressed the rental value of the "TCE Area Loss" as well and that portion of the evidence is not at issue on appeal.

5. Mr. Bidencope also assumed that the change in slope of the driveway made it "uncertain" that "large trucks and emergency vehicles" such as fire trucks could enter the property. Mr. Bidencope's appraisal stated that "[a] motel property cannot operate without the ability of emergency vehicles being able to access the property." But again, there was no evidence that emergency vehicles could not enter the property.

> looking to buy or rent the property on the effective date of the condemnation would consider this factor. . . . .
>
> . . . .
>
> . . . . The uncertainly of use adds risk and adversely impacts the operation of the remainder of the property, which impact[s] the real property market value that a knowledgeable and willing buyer would pay.

But the consideration of what a willing buyer would pay for the entire property *during the construction* is not part of the measure of damages for a temporary construction easement.[6] *See generally id.*

In summary, Mr. Bidencope's opinions regarding the motel's loss of income, the assumption of access being totally blocked to the motel, and the amount a willing buyer might pay for the property during construction were either not supported by the actual evidence or not proper considerations for the jury to calculate damages. The trial court did not abuse its discretion by granting the State's motion in limine on these issues. This argument is overruled.

III. Conclusion

We affirm.

AFFIRMED.

Judges DILLON and INMAN concur.

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6. Valuation during construction is also not part of the valuation of a permanent partial taking, since that valuation is based upon the legal fiction that the project has been completed immediately after the taking. *See generally Barnes v. Highway Commission.*, 250 N.C. at 387, 109 S.E.2d at 227.

EDDINGTON v. LAMB

[260 N.C. App. 526 (2018)]

ZACHARY A. EDDINGTON, PLAINTIFF
v.
KRYSTAL B. LAMB, DEFENDANT

No. COA17-947

Filed 7 August 2018

1. Child Custody and Support—custody—modification—standard

The trial court applied the proper child custody modification standard where the father argued that a temporary order had converted to a permanent order by the operation of time. The relevant time period ends when a party requests that the matter be set for hearing, not when the hearing is held. Here, only nine months elapsed between the entry of the temporary order and the request to set the matter for a hearing, and the matter had not lain dormant.

2. Child Custody and Support—physical custody—sufficiency of findings

The trial court did not abuse its discretion by awarding primary physical custody of a child to the mother and secondary physical custody to the father where the unchallenged findings were adequate for meaningful appellate review and were sufficient to support the trial court's determination. Those findings compared the parents' home environments, mental and behavioral fitness, work schedules as they related to their abilities to care for the child, and past decision-making with respect to the child's care.

3. Child Custody and Support—decision-making authority—health care—education

The portion of a child custody award granting the mother the final decision-making authority for the child's health care and education was vacated and remanded where the findings were not sufficient to support such a broad abrogation of the father's final decision-making authority.

Appeal by plaintiff from order entered 23 February 2017 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 16 May 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Stepp Law Group, PLLC, by Donna B. Stepp and Jordan M. Griffin, for defendant-appellee.

ELMORE, Judge.

Zachary A. Eddington ("Father") appeals a permanent custody order awarding Krystal B. Lamb ("Mother") primary physical custody and awarding him secondary physical custody of their only minor child, A.B.E. ("Ayden").[1] The order also awarded both parties joint legal custody but split decision-making authority by granting Mother final decision-making authority as to Ayden's healthcare and education, and granting Father final decision-making authority as to Ayden's sports.

Father asserts the trial court erred by (1) applying the wrong legal standard applicable to modifying a temporary custody order, as the prior temporary custody order had converted into a permanent custody order by operation of time, (2) awarding physical custody, as its findings were insufficient to support an award granting Mother primary physical custody of Ayden, and (3) awarding legal custody, as its findings were insufficient to support an award that deviated from pure joint legal custody between the parties.

Because the temporary custody order did not convert into a permanent one, we hold that the trial court applied the proper custody modification standard. Additionally, because the trial court's findings were sufficient to support its decision as to what physical custody award would serve Ayden's best interests, and Father failed to demonstrate the trial court abused its discretion in awarding Mother primary physical custody and Father secondary physical custody of Ayden, we affirm the physical custody award. However, because the trial court's findings were insufficient to support its award of joint legal custody with these particular splits in decision-making authority, we vacate the legal custody award and remand for further proceedings on this issue.

I. Background

On 12 May 2008, Father and Mother became parents to their only child together, Ayden. All three lived as a family unit from Ayden's birth until September 2011, when the parties separated. Although the parties lived apart after ending their relationship, their homes were located about one mile apart on the same road, and they split custody of Ayden on a nearly equal basis.

1. A pseudonym is used to protect the minor's identity.

On 12 November 2013, Father filed a complaint for custody of Ayden. On 27 December 2013, Mother filed an answer and counterclaimed for custody, child support, and attorneys' fees. On 25 June 2014, the parties entered into a consent order for temporary custody, which awarded Mother primary physical custody of Ayden and Father secondary physical custody, and awarded the parties joint legal custody. The order provided its custodial awards were "non-prejudicial and temporary in nature pending a full hearing on the merits."

On 2 April 2015, Father filed a request to set a hearing on permanent custody. The parties appeared before the court on 13 July 2015 for a status conference on permanent custody and on 17 August 2015 for court-ordered mediation, which was unsuccessful. On 7 October 2015, Mother filed a request to set a hearing on permanent custody, child support, and attorneys' fees. The hearing was calendared for 3 February 2016. But on 13 January 2016, Father moved to continue the hearing, with Mother's consent, on the basis that Father "need[ed] additional time to prepare," since "[Mother]'s discovery responses [were] due after the trial date" and her "responses [were] critical to the preparation of [his] case." On 2 February 2016, the trial court entered an order granting the requested continuance. At a 23 February 2016 case review hearing, the trial court rescheduled the hearing on permanent custody, child support, and attorneys' fees for 29 August 2016.

The parties continued to share custody pursuant to the terms of the temporary custody consent order until the permanent custody hearing began in August 2016. After a three-day hearing, the trial court entered a permanent custody order on 23 February 2017. In its order, the trial court awarded (1) Mother primary physical custody of Ayden and Father secondary custody in the form of visitation, and (2) joint legal custody but split decision-making authority, granting Mother final decision-making authority as to Ayden's healthcare and education, and granting Father final decision-making authority as to Ayden's sports. Father appeals.

II. Analysis

On appeal, Father asserts the trial court erred by (1) applying the incorrect custody modification standard, since by the time of the permanent custody hearing, the temporary order had become permanent by operation of time; (2) awarding Mother primary physical custody of Ayden, and Father secondary custody in the form of visitation, because its findings were insufficient to support its physical custody award; and (3) awarding joint legal custody but splitting decision-making authority, since its findings were insufficient to support deviating from pure joint legal custody.

A. Custody Modification Standard

[1] Father first asserts the trial court applied the wrong custody modification standard. He concedes the 2014 consent order was a temporary custody order when entered but argues it converted into a permanent order by the time of the permanent custody hearing. Thus, Father argues, the trial court improperly applied the legal standard applicable to modifying a temporary custody order, when it should have applied the standard applicable to modifying a permanent custody order. We disagree.

We review *de novo* whether a temporary custody order has converted into a permanent custody order by operation of time. *See Woodring v. Woodring*, 227 N.C. App. 638, 642, 745 S.E.2d 13, 17 (2013) (citing *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011)). A temporary custody order may "become permanent by operation of time[,]" *id.* at 643, 745 S.E.2d at 18 (citations omitted), when "neither party sets the matter for a hearing within a reasonable time," *id.* (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). "Whether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis." *Id.* (quoting *LaValley v. LaValley*, 151 N.C. App. 290, 293 n.6, 564 S.E.2d 913, 915 n.6 (2002)).

The relevant time period starts when a temporary order is entered and ends when a party requests the matter be set for hearing, not when the hearing is held. *See LaValley*, 151 N.C. App. at 293–94 n.5, 564 S.E.2d at 915 n.5 ("We are careful to use the words 'set for hearing' rather than 'heard' because we are aware of the crowded court calendars in many of the counties of this [s]tate."). While we have held that a twenty-three month delay between the entry of a temporary custody order and a party's request to calendar the matter for a permanent custody hearing is unreasonable, thereby converting a temporary custody order into a permanent one, *id.* at 291–93, 564 S.E.2d at 914–15, the reasonableness of the delay depends in part on whether the case lie dormant before the request to set the matter for hearing was made, *see Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (holding a twenty-month delay was not unreasonable when, during that period, the parties had unsuccessfully attempted to negotiate a new custody arrangement); *see also Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 19 (holding twelve months was not unreasonable when, *inter alia*, "the parties were before the court [for custody-related matters] at least three times in the interim period between the entry of the temporary order and the scheduled permanent custody hearing").

Here, only nine months elapsed between entry of the 25 June 2014 temporary custody consent order and Father's 2 April 2015 request to set the matter for a permanent custody hearing. Further, after the temporary custody order was entered, the case did not lie dormant; the parties appeared before the court, another request to set the case for hearing was filed, litigation continued between the parties including discovery requests and answers, a motion to continue was filed and granted, and case review sessions were held. The parents appeared before the court on 13 July 2015 for a permanent custody status conference and, after the case was set for mandatory mediation, the parents appeared before the court on 17 August 2015 to mediate. On 7 October 2015, less than two months after court-ordered mediation was unsuccessful, Mother filed another request to set a hearing on permanent custody, child support, and attorneys' fees. Although that hearing was scheduled for 3 February 2016, on 13 January 2016, Father moved to continue the hearing, with Mother's consent, on the ground that Mother's discovery responses were due after the scheduled hearing date and were necessary to prepare his case. On 2 February 2016, the trial court entered an order granting the motion to continue. On 23 February 2016, during a case review session where both parties' counsel appeared, the trial court rescheduled the hearing for 29 August 2016.

Because Father's request to set the matter for hearing occurred only nine months after entry of the temporary custody order, Mother's request occurred less than two months after court-ordered mediation was unsuccessful, and litigation continued after the temporary order was entered, we conclude under the circumstances of this case that the temporary order did not become permanent by operation of time. Therefore, we hold the trial court applied the proper custody modification standard and overrule this argument.

B. Physical Custody

[2] Father next asserts the trial court's factual findings were insufficient to award Mother primary physical custody of Ayden and, further, that its order should be vacated because its findings are inadequate for meaningful appellate review of whether the trial court abused its discretion in determining what physical custody award would serve Ayden's best interests. We disagree.

As Father does not challenge the evidentiary sufficiency of any factual finding, our review is limited to a *de novo* assessment of whether the trial court's findings support its legal conclusions. *Carpenter v. Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citing

Hall v. Hall, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008)). However, "[w]e review a trial court's [legal conclusion] as to the best interest of the child for an abuse of discretion." *In re C.P.*, ___ N.C. App. ___, ___, 801 S.E.2d 647, 651 (2017) (citing *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . [or] upon a showing that [its ruling] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal citation omitted).

Where, as here, "the trial court finds that both parties are fit and proper to have custody, but determines that it is in the best interest of the child for one parent to have primary physical custody[ ] . . . such determination will be upheld if it is supported by competent evidence." *Hall*, 188 N.C. App. at 530, 655 S.E.2d at 904 (citing *Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999)). "However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238, 158 S.E.2d 77, 80 (1967) (citation omitted); *see also Carpenter*, 225 N.C. App. at 278–79, 737 S.E.2d at 790 (reversing custody order and remanding for further findings where findings were too meager to support the award).

In resolving a custody dispute between parents, a trial court is "entrusted with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties[,]" *Phelps v. Phelps*, 337 N.C. 344, 355, 446 S.E.2d 17, 23 (1994) (quoting *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982)), and must "determine by way of comparisons between the two [parents], upon consideration of all relevant factors, which of the two is best fitted to give the child the home-life, care, and supervision that will be most conducive to [the child's] well-being." *Griffith v. Griffith*, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954). "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child[,]" *Phelps*, 337 N.C. at 352, 466 S.E.2d at 22, and findings supporting this conclusion "may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Hall*, 188 N.C. App. at 532, 655 S.E.2d at 905 (quoting *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978)).

Here, the trial court issued the following unchallenged, and thus binding, factual findings supporting its best-interests conclusion:

> 10. The Plaintiff/Father resides at 3515 Old Camden Road, Monroe, NC in a 1600 square foot home with his new wife, Holland, and with the minor child herein.
>
> 11. Plaintiff/Father's wife, Holland, gets along well with Ayden, and it is in Ayden's best interest to be allowed to continue his relationship with his step-mother.
>
> 12. Plaintiff/Father's home is large enough to accommodate the needs of those who live there, and Plaintiff/Father bought the home in March of 2016, to be in the Unionville School District.
>
> 13. Defendant/Mother resides with her mother, Valerie Lamb, and Ayden at 3716 Old Camden Road, Monroe, NC almost next door to Plaintiff/Father in a two story house on 13 acres. The residence is large enough to accommodate all who live there.
>
> 14. Plaintiff/Father has served as a t-ball and hockey coach for Ayden.
>
> 15. As of date of trial, Plaintiff/Father was out of work collecting worker's compensation due to a shoulder injury. Once he returns to work as a welder, his hours are 6:30 a.m. to 3:00 p.m. in Lancaster, SC, about a 37 minute drive from his home.
>
> 16. Defendant/Mother is employed full time as a PRN health care technician at CMC-Union and has been so employed continuously there since 2011. In that she works PRN, Defendant/Mother has the ability of making out her own schedule, which aids in her care of Ayden.
>
> 17. There has been a break down and lapse in the parties' ability to communicate about Ayden's needs and best interests that runs contrary to his best interests.
>
> 18. There have been in February of 2011 instances of DV between Plaintiff/Father and Defendant/Mother in front of Ayden that were contrary to his best interests that resulted in police being summoned and Defendant/Mother being arrested. The charges against Defendant/Mother were later dismissed with the concurrence of the Plaintiff/Father.

19. Ayden has been prescribed medication for ADHD by his physician. Plaintiff/Father disagrees with the appropriateness of that medication being administered to Ayden and does not see to it that Ayden gets his medicine as prescribed, which is contrary to Ayden's best interests to have his medicine administered to him only intermittently.

20. Plaintiff/Father sent Defendant/Mother a text in September of 2013, prior to filing his Compliant for custody, telling Defendant/Mother that he never wanted to see his son again and nevertheless posting comments on social media that described himself as "a father from a distance" to Ayden. This resulted in Plaintiff/Father not seeing his son Ayden for approximately 85 days. Such behavior was grossly contrary to Ayden's best interests.

21. Plaintiff/Father had legitimate concerns that Defendant/Mother is or has been in the past involved romantically or otherwise with Steven Dayton, a convicted felon and known drug addict as well as Tumani Washington, neither of whom this Court finds to be suitable persons to be around Ayden. Said involvement with Mr. Dayton has been as recent as Summer 2015 according to various Facebook posts, and is contrary to Ayden's best interest. Defendant/Mother admits in retrospect that associating with Mr. Dayton was a lapse in judgment on her part.

22. Plaintiff/Father was less than credible when he testified that "a doctor" had told him that melatonin caused his son's nosebleeds.

23. Ayden currently attends after school at Unionville Elementary where he is in the 3rd grade.

24. Defendant/Mother emailed Plaintiff/Father about stopping conversations with him because of him reportedly halting or being slow in his payment of child support to her. Ending conversation between his two parents because of lack of child support is contrary to best interest of Ayden.

25. Plaintiff/Father enrolled Ayden in after school unilaterally and without conferring with Defendant/Mother first, nor did Plaintiff/Father list Defendant/Mother as a contact

person for Ayden at after school. This was all contrary to best interest. Because of her PRN schedule, Defendant/Mother is able to care for Ayden instead of placing him in after school on her days with him.

26. Defendant/Mother has been diagnosed as being bi-polar and is currently taking Topamax, Wellbutrin, Adderall, and Almapin for same.

27. Defendant/Mother's mother, Valerie Lamb, appears to the Court to be a stabilizing and positive influence in her daughter's life and that of Ayden.

28. Despite Plaintiff/Father and Defendant/Mother living so close to one another, this is not a case where a 50/50 split would serve Ayden's best interests, because the parties do not communicate with each other in a civil manner and because there is such friction between Plaintiff/Father and Defendant/Mother on deciding what is in Ayden's best interests. Ayden needs consistency and routine in his parental approach to his schooling and health care needs, in particular Ayden taking his ADHD medicine daily.

. . . .

32. Plaintiff/Father has an average gross monthly income of $3,842.00 from his regular employment, and $2,130.00 from his temporary worker's compensation.

33. Defendant/Mother has an average gross monthly income of $2,075.00.

We conclude these unchallenged findings are adequate for meaningful appellate review and were sufficient to support the trial court's determination of what physical custody award would serve Ayden's best interests. The findings compared the parents' home environments, mental and behavioral fitness, work schedules as it relates to their abilities to care for Ayden, and past decision-making with respect to Ayden's care. Accordingly, we deny Father's request to vacate the order based on insufficient findings bearing on Ayden's welfare. Further, these findings demonstrate that the trial court's best-interests conclusion—that primary physical custody with Mother and secondary custody with Father served Ayden's best interests—was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

For example, the trial court found that Father works from "6:30 a.m. to 3:00 p.m. in Lancaster, SC, about a 37 minute drive from his home" and enrolled Ayden in after school, while Mother is able to set her own work schedule, "which aids in her care of Ayden" and can "care for Ayden instead of placing him in after school on her days with him"; that Father's unilateral decision to enroll Ayden in after school and not list Mother as a contact person for Ayden was "all contrary to best interest," since Mother "is able to care for Ayden instead of placing him in after school on her days with him"; that Father texted Mother "that he never wanted to see his son again," resulting in Father "not seeing his son Ayden for approximately 85 days," which was "behavior . . . grossly contrary to Ayden's best interests"; that "Ayden has been prescribed medication for ADHD by his physician," but Father "disagrees with the appropriateness of that medication . . . and does not see to it that Ayden gets his medicine as prescribed, which is contrary to Ayden's best interests to have his medicine administered to him only intermittently"; and that "Ayden needs consistency and routine in his parental approach to his schooling and health care needs, in particular Ayden taking his ADHD medicine daily." Accordingly, we hold the trial court did not abuse its discretion in awarding primary physical custody of Ayden to Mother and secondary physical custody to Father. Therefore, we affirm its physical custody award.

C. Legal Custody

[3] Father next asserts the trial court's findings were insufficient to support its deviation from pure joint legal custody by granting Mother final decision-making authority as to Ayden's health care and education. We agree, vacate the part of the award allocating decision-making authority, and remand for further findings on the issue of joint legal custody.

" '[L]egal custody' . . . refer[s] generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006) (citations omitted). "Our trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (citing *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28). While we review a trial court's deviation from pure joint legal custody for abuse of discretion, "a trial court's findings of fact must support the court's exercise of this discretion." *Id.*; *see also Diehl*, 177 N.C. App. at 647–48, 630 S.E.2d 28–29 (reversing joint legal custody award where the findings were insufficient to support the particular allocation of decision-making authority between the parents and remanding

for further findings on the issue of joint legal custody); *Hall*, 188 N.C. App. at 535–36, 655 S.E.2d at 906–07 (same). Our review thus centers on "whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Hall*, 188 N.C. App. at 535, 655 S.E.2d at 906.

In *Diehl*, we held the trial court's findings were insufficient to support its deviation from pure joint legal custody by granting the mother "primary decision making authority," which, in the case of a dispute between the parents, effectively "stripped [the father] of all decision-making authority . . . ." 177 N.C. App. at 646, 630 S.E.2d at 28. Because "only the court's findings regarding the parties' difficulty communicating and [the mother's] occasional troubles obtaining [the father's] consent could be construed to indicate anything other than traditional joint legal custody would be appropriate," *id.* at 648, 630 S.E.2d at 29, we reversed the trial court's ruling awarding primary decision-making authority to the mother and remanded for further proceedings on the issue of joint legal custody, *id.*

Similarly, in *Hall*, we held the trial court's findings were insufficient to support its deviation from pure joint legal custody by granting a parent "decision-making authority regarding all issues affecting the minor children except for issues regarding sports and extracurricular activities." 181 N.C. App. at 533–34, 655 S.E.2d at 906 (brackets omitted). We clarified *Diehl*'s holding as follows: "[T]he trial court may only deviate from 'pure' legal custody after making specific findings of fact" and, therefore, interpreted *Diehl* as requiring a reviewing court to "determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Id.* at 535, 655 S.E.2d at 906. Because the trial court in *Hall* "made no findings that a split in the decision-making was warranted[,]" *id.*, we reversed the trial court's ruling regarding its split of decision-making authority and remanded for further proceedings on the issue of joint legal custody, *id.* at 535, 655 S.E.2d at 907. We instructed:

> On remand, the trial court may allocate decision-making authority between the parties again; however, were the court to do so, it must set out *specific findings* as to why deviation from "pure" joint legal custody is *necessary*. Those findings must detail why a deviation from "pure" joint legal custody is in the *best interest of the children*. As an example, past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, would be sufficient,

> but mere findings that the parties have a tumultuous relationship would not.

Id. at 535–36, 655 S.E.2d at 907 (internal footnote omitted).

Contrarily, in *MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996), *abrogated on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998), we held the trial court's findings were sufficient to support its deviation from pure joint legal custody by granting a parent sole religious training decision-making authority. *Id.* at 567–69, 473 S.E.2d at 786–87. There, the trial court found:

> [T]he parties had agreed to rear the minor child in the Jewish faith; the child has had a positive sense of identity as a Jew since she was three years old and has had substantial involvement with the Judea Reform Congregation Synagogue in Durham; and since her introduction into activities at the Edenton United Methodist Church, the child has experienced stress and anxiety as a result of her exposure to two conflicting religions which have had a detrimental effect on her emotional well-being.

Id. at 569, 473 S.E.2d at 787. We reasoned these "findings . . . demonstrate[d] affirmatively a causal connection between the conflicting religious beliefs and a detrimental effect on the child's general welfare" and thus "support[ed] . . . granting [the father] charge of [the minor's] religious training and practice . . . ." *Id.* Accordingly, we affirmed the trial court's allocation of decision-making authority. *Id.*

Here, the trial court awarded both parents permanent joint legal custody and ordered they "shall confer on all issues of major importance regarding [Ayden's] well-being[.]" However, the trial court's award further ordered that, "in the event of disagreement, . . . Mother shall have final decision making authority regarding health care and education." Similar to the terms of the legal custody award in *Diehl*, the terms of the award here, if the parties disputed any matter relating to Ayden's health care or education, essentially abrogated Father's decision-making authority. Our review is whether the trial court's findings supported its discretionary decision to order such a deviation from pure joint legal custody.

As to the split in health care decision-making authority, the trial court issued the following relevant facts:

> 19. Ayden has been prescribed medication for ADHD by his physician. Plaintiff/Father disagrees with the

> appropriateness of that medication being administered to Ayden and does not see to it that Ayden gets his medicine as prescribed, which is contrary to Ayden's best interests to have his medicine administered to him only intermittently.
>
> . . . .
>
> 22. Plaintiff/Father was less than credible when he testified that "a doctor" had told him that melatonin caused his son's nosebleeds.
>
> . . . .
>
> 28. . . . [T]his is not a case where a 50/50 split would serve Ayden's best interests, because . . . there is such friction between Plaintiff/Father and Defendant/Mother on deciding what is in Ayden's best interests. Ayden needs consistency and routine in his parental approach to his . . . health care needs, in particular Ayden taking his ADHD medicine daily.

While these findings may support the trial court's exercise of discretion in deviating from pure joint legal custody by granting Mother final decision-making authority if the parties dispute matters concerning Ayden's ADHD treatment, we conclude the findings are insufficient to support such a broad abrogation from Father of final decision-making authority as to all issues related to Ayden's health care. While the parties disputed the appropriateness of Ayden's ADHD medication, and the trial court found its inconsistent administration would be contrary to Ayden's best interests, no other findings indicate any other health care dispute rendering it necessary for Ayden's best interests to deviate from a pure joint legal custody award by abrogating Father from final decision-making authority as to all matters relating to Ayden's health care. Accordingly, we vacate that part of the legal custody award granting Mother final health care decision-making authority and remand for further proceedings regarding this issue as it relates to joint legal custody.

As to the split in education decision-making authority, the trial court issued the following relevant facts:

> 25. Plaintiff/Father enrolled Ayden in after school unilaterally and without conferring with Defendant/Mother first, nor did Plaintiff/Father list Defendant/Mother as a contact person for Ayden at after school. This was all contrary to best interest. Because of her PRN schedule, Defendant/

> Mother is able to care for Ayden instead of placing him in after school on her days with him.
>
> . . . .
>
> 28. . . . [T]his is not a case where a 50/50 split would serve Ayden's best interests, because . . . there is such friction between Plaintiff/Father and Defendant/Mother on decision what is in Ayden's best interests. Ayden needs consistency and routine in his parental approach to his schooling . . . [.]

While these findings may support the trial court's exercise of discretion in deviating from pure joint legal custody by granting Mother final decision-making authority if the parties dispute matters concerning Ayden's enrollment in after school, we conclude the findings are insufficient to support such a broad abrogation from Father of final decision-making authority as to all matters relating to Ayden's education. Whether to enroll a child in an after-school program is not a dispute about any substantive educational matter, such as, for example, which school Ayden should attend. These findings neither affirmatively demonstrate any causal link between a dispute about an academic or schooling matter and any negative effect on Ayden, nor demonstrate how such a deviation from pure joint legal custody was necessary to serve Ayden's best interests. Accordingly, we vacate that part of the legal custody award granting Mother final education decision-making authority and remand for further proceedings regarding this issue as it relates to joint legal custody.

Because we conclude the trial court's findings were insufficient to support its exercise of discretion in deviating from a pure joint legal custody award by allocating decision-making authority between the parents in this manner, we vacate the trial court's rulings allocating decision-making authority and remand for further proceedings on the issue of joint legal custody. "On remand, the trial court may identify specific areas in which [either parent] is granted decision-making authority upon finding appropriate facts to justify the allocation." *Diehl*, 177 N.C. App. at 648, 630 S.E.2d at 29.

III. Conclusion

Because the temporary custody order did not become permanent by operation of time, we hold that the trial court applied the proper custody modification standard applicable to temporary custody orders. The trial court's factual findings supporting its physical custody award were

sufficient to enable meaningful appellate review and to support the trial court's conclusion as to what award would serve Ayden's best-interests. Because we discern no abuse of discretion in the trial court's decision to award Mother primary physical custody and Father secondary physical custody of Ayden, we affirm its physical custody award. However, because we conclude the trial court's factual findings were insufficient to support its exercise of discretion in splitting decision-making authority in this manner, we vacate its rulings granting Mother final health care and education decision-making authority and remand for further proceedings on the issue of joint legal custody.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and ZACHARY concur.

IN THE MATTER OF A.P.

No. COA16-1010-2

Filed 7 August 2018

Native Americans—Indian Child Welfare Act—neglected child—notice

The case of a juvenile who was adjudicated as neglected and dependent was remanded to the trial court for notice to be sent to the appropriate tribes in compliance with the federal Indian Child Welfare Act (ICWA). A form indicating the mother's American Indian heritage was sufficient to put the trial court on notice that the matter may concern an Indian child and trigger the notice requirements of the ICWA.

Appeal by respondent from order entered 29 June 2016 by Judge Ty Hands in Mecklenburg County District Court. This case was originally heard before this Court on 3 April 2017. *In re A.P.*, __ N.C. App. __, 800 S.E.2d 77 (2017). Upon remand from the Supreme Court of North Carolina, *In re A.P.*, __ N.C.__, 812 S.E.2d 840 (2018).

Mecklenburg County Department of Social Services, Youth and Family Services, by Associate Attorney Christopher C. Peace, for petitioner-appellee.

Anné C. Wright for respondent-appellant.

Guardian ad Litem Appellate Counsel Matthew D. Wunsche for guardian ad litem.

TYSON, Judge.

The Supreme Court of North Carolina remanded this case for this Court's review of the remaining issues raised by Respondent-mother's appeal. *In re A.P.*, __ N.C.__, 812 S.E.2d 840 (2018). Respondent appeals from an order adjudicating her minor daughter, A.P., to be a neglected and dependent juvenile. The Supreme Court of North Carolina held the Mecklenburg County Youth and Family Services ("YFS") had standing to file the juvenile petition. We remand for the trial court to determine and ensure that the federal Indian Child Welfare Act ("ICWA") notification requirements are met. 25 U.S.C. § 1912(a) (2012); 25 C.F.R. § 23.107(b)(2) (2018).

I. Background

A.P. was born in August 2015, while Respondent was living at the Church of God Children's Home (the "Home"), located in Cabarrus County. Shortly after A.P.'s birth, Respondent began to display irrational behaviors. Respondent was subsequently involuntarily committed for mental health treatment in Mecklenburg County. Respondent agreed to a safety plan with the Cabarrus County Department of Social Services ("CCDSS") to allow A.P. to live at the Rowan County home of an employee ("Ms. B.") of the Home, while Respondent was undergoing in-patient mental health treatment.

Later, Respondent identified her grandfather's home in Mecklenburg County as a place where she could live with A.P. upon her release from in-patient mental health treatment. CCDSS asked YFS to investigate the grandfather's home for appropriateness for A.P. YFS found her grandfather's home to be appropriate, and Respondent moved into the home with A.P. Respondent entered into an agreement with CCDSS that she would cooperate with YFS in developing and following an in-home family services plan, and CCDSS transferred the social services case to YFS.

On 25 November 2015, Respondent's sister discovered Respondent and A.P. were living away from the grandfather's home in a dilapidated house in Mecklenburg County. Respondent's sister took A.P. to Ms. B., and YFS subsequently approved the placement of A.P. with Ms. B. in Rowan County. YFS determined Respondent needed substance abuse

treatment and other services. Respondent initially engaged in services that were performed in Mecklenburg County.

At an 18 December 2015 meeting with YFS, Respondent agreed that A.P. would continue to stay with Ms. B., while she lived with a family friend in South Carolina. Respondent returned to Mecklenburg County in January 2016. She was subsequently jailed on unidentified criminal charges. From 18 to 20 February 2016, Respondent was again an inpatient at Davidson Mental Health Hospital in Mecklenburg County.

On 22 March 2016, Respondent informed YFS that she was now residing in Cabarrus County. On 23 March 2016, Ms. B., A.P.'s caretaker, informed YFS that she could no longer care for A.P. On 29 March 2016, YFS retrieved the child from Ms. B. and obtained a nonsecure custody order from a Mecklenburg County magistrate. On 30 March 2017, YFS filed the nonsecure custody order and a juvenile petition alleging A.P. was a neglected and dependent juvenile.

After an adjudication and disposition hearing, the trial court concluded A.P. was a neglected and dependent juvenile. The court continued custody of A.P. with YFS, with placement in YFS's discretion. The court ordered Respondent to have supervised visitation with A.P., for Respondent to enter into an out-of-home family services agreement with YFS and, to comply with the terms of the agreement. Respondent filed timely notice of appeal.

In the earlier review of *In re A.P.*, __ N.C. App. __, 800 S.E.2d 77, this Court unanimously held YFS lacked standing to file the juvenile petition and vacated the trial court's order. *In re A.P.* at __, 800 S.E. 2d at 82. The Supreme Court determined that "the legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions to only directors of county departments of social services in the county where the juvenile at issue resides or is found[,]" and remanded to this Court. *In re A.P.*, __ N.C .at __, 812 S.E.2d at 844.

II. Indian Child Welfare Act

Respondent-mother argues the adjudication hearing should have been continued for further investigation into the applicability of ICWA to this petition. We agree.

The ICWA was enacted by Congress in 1978 to establish the "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests of Indian children and to promote

the stability and security of Indian tribes and families." 25 U.S.C. § 1902 (2012). In relevant part ICWA states:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a).

An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2012). ICWA's notice requirement is mandatory and triggered when the proceeding is a "child custody proceeding," and the child involved is determined to be an "Indian child" of a federally recognized tribe. *In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644 (2005).

At the time the nonsecure custody order was obtained and at A.P.'s adjudication as neglected, this Court had stated "[t]he burden [was] on the party invoking [ICWA] to show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative." *In re C.P.*, 181 N.C. App. 698, 701-02, 641 S.E.2d 13, 16 (2007) (citing *In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002)).

Under current federal regulations effective 12 December 2016, the burden rests upon the state courts to confirm that active efforts have been made to prevent the breakup of Indian families and those active efforts must be documented in detail in the record. *In re L.W.S.*, __ N.C. App. __, __, 804 S.E.2d 816, 819, nn. 3-4 (2017); 25 C.F.R. § 23.107(a), (b)(1)-(2) (2018).

Whether the evidence presented at the adjudication hearing should have caused the trial court to have reason to know an "Indian child" may

be involved and trigger the notice requirement is the issue before us. The federal regulations implementing ICWA and promulgated in 2016, clearly the states court has reason to know an "Indian child" is involved if: "Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child." 25 C.F.R. § 23.107(c)(2) (2018).

The ICWA proscribes that once the court has reason to know the child could be an "Indian child," but does not have conclusive evidence, the court should confirm and "work with all of the Tribes . . . to verify whether the child is in fact a member." 25 C.F.R. § 23.107(b)(1). Federal law provides: "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary[.]" 25 U.S.C. § 1912(a). Further, a court must "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child." 25 C.F.R. § 23.107(b)(2).

Other jurisdictions have recognized that "Indian child" status of the juvenile can only be decided by the tribe itself; therefore, only a suggestion that the child may be of Indian heritage is enough to invoke the notice requirements of the ICWA. *In re Antoinette S.*, 104 Cal. App. 4th 1401, 1408, 129 Cal. Rptr. 2d 15, 21 (2002). Additionally, ICWA provides that even after the completion of custody proceedings, if the provisions of ICWA were violated, "any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action." 25 U.S.C. §1914 (2012).

In *In re A.R.*, the Respondent-father claimed that he had "a family connection to a registered Native American group" which consequently qualified his children for the protections under ICWA. *In re A.R.*, 227 N.C. App. 518, 523, 742 S.E.2d 629, 633 (2013). No further evidence on the Indian heritage of the juveniles was presented and the trial court continued the proceedings without ordering any ICWA notification. *Id.* The court then issued an adjudication and disposition order concluding the children were neglected and abused. *Id.* at 519, 742 S.E.2d at 631.

On appeal, this Court recognized that "it appears that the trial court had at least some reason to suspect that an Indian child may be involved" *Id.* at 524, 742 S.E.2d at 634. Further, this Court held that "[t]hough from the record before us we believe it unlikely that [the juveniles] are subject to the ICWA, we prefer to err on the side of caution by remanding

for the trial court to . . . ensure that the ICWA notification requirements, if any, are addressed . . . since failure to comply could later invalidate the court's actions." *Id.*

In the case of *In re C.P.*, the respondent-mother made the bare assertion that she and her children could possibly be eligible for membership with a band of Potawatomi Indians. *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16. The trial court required the ICWA notice to be sent. *Id.* When the time required under ICWA had passed without response from the tribe, the trial court allowed two continuances before determining ICWA did not apply and resumed the proceedings. *Id.* at 703, 641 S.E.2d at 16-17.

On appeal, the respondent asserted error in the trial court's refusal to continue the proceedings until the tribe responded. *Id.* at 701, 641 S.E.2d at 15-16. This Court held the trial court had complied with ICWA where the length of time of the continuance following the notification letter exceeded ICWA requirements and the respondent had offered no additional evidence to sustain her burden of showing the ICWA further applied. *Id.* at 703, 641 S.E.2d at 17.

Our Court has required social service agencies to send notice to the claimed tribes rather than risk the trial court's orders being voided in the future, when claims of Indian heritage arise, even where it may be unlikely the juvenile is an Indian child. *See In re A.R.*, 227 N.C. App. at 524, 742 S.E.2d at 634; *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16.

On 5 April 2016, the seven-day nonsecure custody hearing was held before the trial court. The court's order contains a finding of fact that ICWA was inapplicable. However, evidence concerning A.P., and admitted at the adjudication hearing by YFS, included a 2015 CCDSS form indicating A.P. and her mother have "American Indian Heritage" within the "Cherokee" and "Bear foot" tribes.

After the CCDSS form was provided to Respondent's counsel at trial, counsel brought to the trial court's attention that Respondent and A.P. were of a federally-recognized Indian tribe and YFS did not provide that tribe any notice. The trial court indicated it had specifically made inquiry at the seven-day hearing of whether ICWA applied and determined the Act did not. There is no transcript in the record from the nonsecure custody hearing. The trial court's order notes Respondent-mother arrived late for the hearing and no one from CCDSS was listed as being present. Nothing in the record shows either CCDSS or YFS complied with the notice provisions of ICWA.

The record indicating Respondent-mother's potential "Cherokee" and "Bear foot" Indian heritage was sufficient to put the trial court on notice and provided "reason to know that an 'Indian child' is involved." 25 U.S.C. § 1912(a). *See In re A.R.*, 227 N.C. App. at 524, 742 S.E.2d at 634; *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16.

Once this record was brought to the court's attention, the trial court must direct YFS to send a conforming notification letter to the tribe(s). "[T]he question of the district court's jurisdiction under the ICWA cannot be resolved based on the evidence of record, we must remand the cause for a determination of subject matter jurisdiction." *In re E.G.M.*, 230 N.C. App. 196, 204, 750 S.E.2d 857, 862 (2013) (citation omitted).

We remand to the trial court to issue an order requiring notice to be sent by YFS as required by 25 U.S.C. § 1912(a), and which complies with the standards outlined in 25 C.F.R. § 23.111 (2018). If no response to this notification is received, the Respondent-mother must meet her burden to produce evidence to sustain ICWA's application in this case. *See In re C.P.*, 181 N.C. App. at 701-02, 641 S.E.2d at 16 (citation omitted). If a response or other evidence is received confirming A.P. qualifies as an "Indian child," the trial court shall comply with the corresponding provisions in ICWA and with the wishes of that tribe.

"In the event that the trial court concludes on remand that it lacks subject matter jurisdiction . . . , then it will be required to dismiss the petition . . . ." *In re M.G.*, 187 N.C. App. 536, 548 n. 5, 653 S.E.2d 585, 588 n. 5 (2007), *rev'd on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009).

III. Conclusion

This case is remanded to the district court for further proceedings. The trial court shall insure the ICWA's notice and other mandatory requirements are met. YFS is to notify "by registered mail with return receipt requested" to Respondent-mother and child's potential tribe(s). No further "proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary; *Provided*, that the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." 25 U.S.C. § 1912(a). Respondent-mother's remaining challenges are preserved pending the outcome on remand. *It is so ordered.*

REMANDED.

Judges BRYANT and DAVIS concur.

IN RE I.K.

[260 N.C. App. 547 (2018)]

IN THE MATTER OF I.K., K.M.

No. COA18-94

Filed 7 August 2018

1. Guardian and Ward—guardianship—findings—parents unfit—parents acted inconsistently with status as parents—waiver

The trial court erred by awarding guardianship of two children to their grandmother without first finding that the parents were unfit to parent or had acted inconsistently with their constitutionally protected status as parents. Although the Department of Social Services argued that the parents waived appellate review of this issue by failing to raise it at the hearing, no waiver occurred because the trial court did not permit arguments.

2. Child Abuse, Dependency, and Neglect—reunification efforts—cessation—sufficiency of findings

The trial court's findings were insufficient to support its conclusion that efforts to reunite two children with their parents should cease, where the trial court's order did not demonstrate what evidence convinced the court that the parents had made minimal progress toward reunification and the evidence was a mixed bag.

Appeal by respondent-parents from order entered 7 November 2017 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 21 June 2018.

Holcomb & Stephenson, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant mother.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for respondent-appellant father.

Alston & Bird LLP, by Matthew P. McGuire, for guardian ad litem.

MURPHY, Judge.

Respondent mother ("Patty")[1] and respondent father ("Isaac") appeal from an order ceasing reunification efforts and awarding guardianship of the minor children I.K. ("Iliana") and K.M. ("Kevin") to the maternal grandmother. Because the trial court's findings do not address Respondents' fitness, whether they acted inconsistent with their constitutionally protected status, or why reunification efforts should cease, we vacate the trial court's 7 November 2017 order and remand for further proceedings.

BACKGROUND

Kevin was born to Patty in May 2008. Kevin's father is not a party to this appeal. Iliana was born to Respondents in December 2012. On 10 November 2014, the Rockingham County Department of Social Services received a report that Respondents lived in a "hoarder home" that was unsafe, Respondents sold their food stamps, Kevin was small for his age, there was fighting in the home, and Respondents were smoking marijuana and snorting Percocet. The Rockingham County Department of Social Services investigated this report, but no services were recommended at the time.

In 2015, the Orange County Department of Social Services ("DSS") received two reports alleging that Patty had snorted pills while Kevin was in the home, and that Patty and her brother were involved in a domestic dispute that resulted in the brother shaking and hitting Kevin. At that point, Respondents were provided in-home services to address concerns of substance use, mental health, and domestic violence. On 8 January 2016, Patty was sentenced to 45 days in jail for shoplifting and violating her probation. Patty received another 45 day sentence in April 2016 after a drug test conducted by her probation officer tested positive for cocaine. At that time, Respondents placed Iliana with the maternal grandmother. For the previous five years, Kevin had been residing with his maternal grandmother. On 5 August 2016, Patty informed a DSS social worker that Respondents were being evicted from their home and were homeless.

Due to concerns regarding Respondents' unstable housing, substance abuse, and lack of engagement in substance abuse treatment services, DSS filed juvenile petitions on 10 August 2016 alleging that Kevin and Iliana were neglected and dependent juveniles. DSS obtained nonsecure custody that same day. Following a 15 September 2016 hearing, the trial

1. Pseudonyms are used throughout this opinion to protect the identity of juveniles and for the ease of reading. See N.C. R. App. P. 3.1(b).

court entered an order on 13 October 2016 adjudicating the juveniles dependent, keeping temporary legal and physical custody with the maternal grandmother. The order required Respondents to submit to random drug screens, seek substance abuse treatment services, and follow any treatment recommendations. After a permanency planning hearing on 2 March 2017, the trial court entered an order on 27 March 2017 establishing a primary permanent plan of guardianship with the maternal grandmother and a secondary plan of reunification with Respondents. Following a 5 October 2017 permanency planning hearing, the trial court entered a 7 November 2017 order ceasing reunification efforts and awarding guardianship of the children to the maternal grandmother. Respondents timely appealed the 7 November 2017 order.

ANALYSIS

A. Guardianship

[1] Respondents first contend that the trial court erred in awarding guardianship of the children to the maternal grandmother without first finding that Respondents were unfit to parent or had acted inconsistently with their constitutionally protected status as parents. We agree.

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (alteration in original) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). "[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted).

DSS and the children's guardian *ad litem* ("GAL") do not refute Respondents' contention that the trial court failed to make the required finding, but instead argue that Respondents waived appellate review of this argument by not raising the issue at the hearing. DSS and the GAL cite this Court's previous pronouncement that "a parent's right to findings regarding her constitutionally protected status is waived if the

parent does not raise the issue before the trial court." *In re R.P.*, ___ N.C. App. ___, ___, 798 S.E.2d 428, 430-31 (2017). However, in *R.P.* we also held that there is no waiver where the party "was not afforded the opportunity to raise an objection at the permanency planning review hearing." *Id.* at ___, 798 S.E.2d at 431. In that case, the trial court indicated at a permanency planning review hearing that it would determine guardianship at the next hearing. *Id.* at ___, 798 S.E.2d at 431. Then, at the next hearing, the trial court did not allow any evidence to be presented concerning guardianship, stating that guardianship had been determined at the prior hearing. *Id.* at ___, 798 S.E.2d at 431.

In the present case, the trial court did not permit arguments. At the conclusion of the hearing, Patty's counsel asked:

> "Judge, can we be heard?"

To which the trial court responded:

> I've heard from you. I know what you want done. Appreciate it.

Thus, the trial court prevented the Respondents from making arguments concerning Respondents' constitutionally protected status as parents, and Respondents cannot be said to have waived their contention on appeal. As to the merits of Respondents' contention, the trial court did not make a finding that Respondents were unfit or had acted inconsistent with their constitutionally protected status. Absent such a finding, the trial court erred in applying the best interest of the child test to determine that guardianship with the maternal grandmother was in the children's best interests. As a result, we vacate that portion of the trial court's order awarding guardianship and remand.

B. Reunification

[2] Respondents next contend that the trial court erred in ceasing reunification efforts. We conclude that the trial court's findings are insufficient to support its conclusion that reunifications efforts should cease.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re T.R.M.*, 208 N.C. App. 160, 162, 702 S.E.2d 108, 110 (2010) (citation omitted).

"At the conclusion of each permanency planning hearing, the judge shall make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-906.1(g) (2017). "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b). However, the trial court failed to make findings pursuant to N.C.G.S. § 7B-901(c) or to find that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety. To cease reunification in this way:

> [T]he court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d).

Here, the trial court made the following findings of fact relevant to its decision to cease reunification efforts:

> 7. It is not possible for the juveniles to be returned home in the immediate future or within the next six (6) months and in support thereof, the court specifically finds:
>
> a) Respondent parents have been involved with [DSS] since October 2015 due to concerns about substance use, domestic violence, and unstable housing.
>
> b) Respondent parents have made minimal progress on their case plan objectives, which led to a petition being filed in August 2016.
>
> c) Respondent parents' compliance improved after the court date in March 2017, however they each have missed one drug screen since the last hearing.

d) [DSS] has concerns that [Patty] may be abusing prescription medication. [Patty] has attended substance abuse groups at Freedom House.

e) Respondent parents had a domestic altercation in October 2016. [Patty] attended the first component of domestic violence counseling classes at the Compass Center in Chapel Hill, began the second component in June, 2017 and continues to attend.

f) The parents' minimal progress, including the lack of full engagement with services and refusal to comply with all drug screens as set forth above, is not adequate to continue to pursue reunification as a primary or secondary plan.

g) While respondent parents have demonstrated some cooperation with their case plan and remained involved in their case, their insufficient progress for reunification demonstrates that they are acting inconsistently with the juveniles' health and safety.

. . . .

18. Further reunification efforts would be inconsistent with the juveniles' health and safety.

Respondents appear to challenge finding 7(b), but neither explains how the finding lacks evidentiary support. At various points in their briefs, both cite to examples in the record of their compliance with their case plans, but these mostly occurred after the juvenile petitions were filed. Read in context, finding 7(b) notes Respondents' lack of progress on their case plans *prior to* the juvenile petitions being filed. Respondents do not contest that they made minimal progress on their case plans prior to August 2016.

Isaac challenges the statement in finding 7(c) that Respondents "each have missed one drug screen since the last hearing." We agree that this finding is unsupported by the evidence. The last hearing in this case was on 15 June 2017, and the evidence at the 5 October 2017 hearing showed that Respondents had last missed a drug screen on 5 June 2017. We therefore disregard this portion of finding 7(c) in our analysis.

Patty next appears to challenge finding 7(d), essentially arguing that DSS's concerns regarding her abuse of prescription medication were unfounded. However, Patty does not contest that DSS *had* such

concerns, which is what the finding actually states. Patty fails to demonstrate that finding 7(d) is unsupported by the evidence.

Respondents broadly challenge the statements in findings 7(f) and (g) that they made "minimal progress" and "insufficient progress for reunification." While we find evidence in the record that could support such findings, we also find evidence which tends to show that Respondents were making reasonable progress on their case plans; the trial court's findings are not sufficiently specific to allow this Court to determine what evidence the trial court relied on in reaching this ultimate finding. The trial court found that Respondents' compliance with their case plans had improved since March 2017, and did not make any findings as to Respondents' conduct since that time that could demonstrate that Respondents were making minimal or insufficient progress. The only specific finding made by the trial court that could support its ultimate finding of minimal progress relates to one incidence of domestic violence between Respondents occurring in October 2016, which, in light of the finding relating Respondents' improved compliance since March 2017, is not sufficient alone to show that Respondents had made insufficient progress by the 5 October 2017 hearing. Thus, the order itself does not make findings sufficient to demonstrate what the trial court looked to in determining that Respondents had made minimal progress toward reunification.

The order did incorporate by reference the DSS and GAL court reports submitted for the 5 October 2017 hearing. The statements in those reports regarding Respondents' compliance with their case plans and progress toward reunification, however, are decidedly mixed. The DSS report noted that Patty's case plan asked her to "engage in substance abuse treatment services, including residential treatment if possible, and to submit to random drug screens as necessary," to "participate in mental health treatment," and to "participate in domestic violence education." Evidence suggesting that reunification would be inconsistent with the children's health and safety included that Patty twice appeared to be under the influence of drugs during family events in June and July 2017, complied with eighteen of twenty-eight random drug screens, tested positive for hydrocodone in January 2017, last refused a drug screen on 5 June 2017, and sought to obtain her father's pain medication in September 2017.

In contrast to this evidence, Patty had been regularly attending weekly substance abuse group meetings and individual therapy sessions since February 2017, signed up for and completed parenting classes

without being asked to do so, and had regularly attended domestic violence classes since April 2017. Furthermore, Patty's January 2017 drug screen was the only one in which she tested positive, and she produced a prescription for the hydrocodone.

The DSS report notes that Isaac's case plan asked him to address issues of substance abuse. Evidence suggesting that reunification would be inconsistent with the children's health and safety included that Isaac appeared to be under the influence of drugs during a family event in July 2017, complied with sixteen of twenty-seven random drug screens; tested positive for oxycodone in January 2017, last refused a drug screen on 5 June 2017, and was unwilling to participate in domestic violence classes until it was court ordered in May 2017.

In contrast to this evidence, Isaac regularly met with an individual counselor addressing substance abuse once a month, began attending domestic violence classes in June 2017, and signed up for and completed parenting classes without being asked to do so. Isaac's January 2017 drug screen was the only one in which he tested positive.

As to both parents, the reports noted that their living situation was appropriate, and "[a]ttendance at visits with [the] children has been excellent." Thus, the evidence contained in the DSS and GAL reports, while indicating concern with the parents extensive history of substance abuse and sustainability of Respondents recent improvements, fails to support a finding or conclusion that reunification efforts should cease, and the trial court's own findings provide little indication as to what clear and convincing evidence it found persuasive in concluding that reunification would be inconsistent with the children's health and safety.

The trial court held a permanency planning hearing on 15 June 2017 and determined that reunification efforts should continue. Since that time, while there was one occasion where Respondents were suspected of being under the influence of drugs, Respondents neither failed nor refused a drug screening. There had been no reported incidents of domestic violence, and both were attending classes to address their issues. At the 5 October 2017 permanency planning hearing, this evidence requires the trial court to adjudicate and have made additional evidentiary findings demonstrating why reunification efforts should cease at that point. "Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the trial court's] judgment.' " *In re L.L.O.*, ___ N.C. App. ___, ___, 799 S.E.2d 59, 66 (2017) (alteration in original) (quoting *In re M.K.*, 241 N.C. App. 467, 471, 773 S.E.2d 535, 538 (2015)). As a result,

we must vacate the permanency planning order and remand to the trial court.[2]

CONCLUSION

We conclude that the trial court failed to make the required finding that Respondents were unfit or had acted inconsistent with their constitutionally protected status as parents. Absent such a finding, the trial court erred in applying the best interest of the child test to determine that guardianship with the maternal grandmother was in the children's best interests. As a result, we must vacate that portion of the trial court's order awarding guardianship and remand for further findings.

In addition, we conclude that the trial court's findings are not sufficient to support its conclusion that reunifications efforts should cease. We vacate and remand for the trial court to make additional evidentiary findings. In the event the trial court on remand again determines that reunification efforts should cease, the court is directed to make additional findings in support of that determination. On remand, "[w]e leave to the discretion of the trial court whether to hear additional evidence." *In re F.G.J.*, *M.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009).

VACATED AND REMANDED.

Judges DIETZ and TYSON concur.

2. Patty additionally argues, "The trial court lacked competent evidence to conclude that [Patty's] visitation with the minor children required supervision." However, Patty cites to no authority in support of this contention and therefore has abandoned the issue on appeal. N.C. R. App. P. 28(b)(6).

CLIFFORD PRESS, AS AUTHORIZED REPRESENTATIVE OF THE FRACTIONAL OWNERS OF THAT CERTAIN AIRCRAFT BEARING TAIL NUMBER N132SL; AIRCRAFT VENTURES, LLC; ROBERT BURT; LYNN C. BURT; CORPORATE HEALTH PLANS OF AMERICA, INC.; GREENSPRING ASSOCIATES, LLC III; HEELBUSTER, LLC; INTERNATIONAL REAL ESTATE HOLDING COMPANY, LLC; M&T ENTERPRISE GROUP, LLC; MESQUITE AIR COMPANY, LLC; SAMOLOT, LLC; SUN FINANCIAL, LLC; TRIO TRAVEL, LLC; TUDOR COURT FARM, LLC; AND WALSH WILLETT AVIATION, LLC, PLAINTIFFS

v.

AGC AVIATION, LLC; ALTERNATIVE VENTURES, LLC; BEECHWOOD ASSOCIATES, LP; CATHERINE T. CALLENDER; DOUGLAS AND MAUREEN COHN; DMGAAIR LLC; FINS & FEATHERS, LLC; FRANKLIN RESEARCH GROUP, INC.; DAVID HAYES, JV PLANE PARTNERS LLC; MRS AIR LLC; N724DB LLC; NICK'S PLANE LLC; VERNON AND SHERIAN PLASKETT, AS TRUSTEES OF THE PLASKETT FAMILY TRUST; DAVID SCHULMAN; MICHAEL C. SLOCUM; TRAVIS PARTNERS, LLC; TRIAD FINANCIAL SERVICES, INC.; AND GREG WENDT, DEFENDANTS

No. COA17-9

Filed 7 August 2018

1. Contracts—language of contract—plain and unambiguous—no extrinsic evidence

In a dispute between fractional owners of airplanes concerning the ownership of certain airplane engines, the language in the agreements between the parties and the now-bankrupt aircraft fractional ownership company were plain and unambiguous, so plaintiff airplane owners were entitled to summary judgment on their claim for declaratory judgment, granting ownership to plaintiffs of the engines that were originally installed on defendant owners' airplane and later removed and installed on plaintiff owners' airplane.

2. Conversion—taking airplane engines—implementation of ownership program

In a dispute between fractional owners of airplanes concerning the ownership of certain airplane engines, the trial court did not err by dismissing defendant airplane owners' counterclaims for conversion, trespass to chattels, and unjust enrichment. The ownership program documents executed by the participant-owners authorized the now-bankrupt ownership company to swap parts between airplanes to maximize the efficiency of the program. Defendants made no showing that the removal of the engines from their airplane and installation on plaintiffs' airplane resulted from anything other than the implementation of the ownership program.

PRESS v. AGC AVIATION, LLC

[260 N.C. App. 556 (2018)]

Appeal by defendants from order entered 21 September 2016 by Judge Richard S. Gottlieb in Superior Court, Guilford County. Heard in the Court of Appeals 8 August 2017.

McGuireWoods LLP, by Brian Kahn, Terrence M. McKelvey, Robert A. Muckenfuss, and Joshua D. Whitlock, for plaintiffs-appellees.

Aero Law Center, by Jonathan A. Ewing, pro hac vice, and Smith, James, Rowlett & Cohen, by Seth R. Cohen, for defendants-appellants.

STROUD, Judge.

This case started when the music stopped, in an aviatic version of the game of musical chairs -- or musical engines -- Avantair was playing with its airplanes. The music stopped when Avantair was forced into bankruptcy, and at that moment, defendants' airplane had no engines, while plaintiffs' airplane had two engines that were originally on defendants' airplane. Plaintiffs filed this declaratory judgment action to resolve the parties' dispute over who gets to keep the engines. Because the controlling contracts allowed Avantair to play musical chairs, plaintiffs get to keep the engines, so we affirm the trial court's order granting summary judgment in plaintiffs' favor and denying defendants' request for summary judgment.

Background

Plaintiff Clifford Press is an authorized representative for the 14 other plaintiffs; the 15 plaintiffs are the fractional owners of a certain Piaggio Avanti P-180 aircraft ("Plaintiffs' Airplane").[1] The plaintiffs acquired their interests in Plaintiffs' Airplane by purchasing a fractional interest from Avantair, Inc. ("Avantair"), as part of its "Fractional Aircraft Ownership Program" ("the Avantair Program"). The plaintiffs were all parties to Ownership Agreements for their aircraft, although the individual plaintiffs each purchased their fractional interests in Plaintiffs' Airplane on different dates. Under the Avantair Program, each plaintiff was the owner of an undivided interest in Plaintiffs' Airplane, and

1. This aircraft was specifically identified in plaintiffs' Ownership Agreements "a Piaggio Avanti P-180, bearing tail number N132SL, together with engines, components, accessories, parts, equipment and documentation installed thereon or attached thereto or otherwise pertaining thereto." For ease of reading, we will simply call it "Plaintiffs' Airplane."

the plaintiffs were registered with the Federal Aviation Administration ("FAA") as the owners.

Defendants are the fractional owners of another airplane, a Piaggo P-180 aircraft bearing the tail number N106SL ("Defendants' Airplane"). Defendants each purchased fractional interests in Defendants' Airplane from Avantair in the same manner and under the same terms as plaintiffs did for Plaintiffs' Airplane.

Plaintiffs and defendants participated in the Avantair Program. The parties all signed and "executed in substantially the same form and substance" an Aircraft Interest Purchase Agreement ("Purchase Agreement") and a Management & Dry Lease Exchange Agreement (the "MDLA") with Avantair. Under the MDLA, Avantair was engaged as the "Manager" of the Avantair Program. Avantair leased both Plaintiffs' and Defendants' Airplanes (as well as other airplanes owned by other owners) from their respective owners and was obligated to "provide or procure certain administrative and aviation support services with respect to each Program Aircraft, including, without limitation, scheduling, maintenance, insurance, record keeping, flight crew training and scheduling, and fuel for or with respect to any Program Aircraft."

In *In re Avantair, Inc.*, 638 F. App'x 970, 2016 U.S. App. LEXIS 1758 (11th Cir. 2016) (unpublished) (*per curiam*), the Eleventh Circuit explained what happened next:

> When Avantair began experiencing financial troubles, the quality of its maintenance operations took a nose dive. To keep as many planes as possible flying, Avantair cannibalized parts from other planes in the fleet, effectively grounding the donor planes. In addition, Avantair failed to keep adequate safety records of the part transfers. When the Federal Aviation Administration caught wind of Avantair's activities, it grounded Avantair's fleet, forcing the company to cease operations and eventually enter bankruptcy.

Id. at 971, 2016 U.S. App. LEXIS 1758 at *3.

On 25 July 2013, creditors forced Avantair into involuntary Chapter 7 bankruptcy, which was still pending in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division when this declaratory judgment action was filed.[2] During the bankruptcy proceedings,

2. On 3 November 2014, the bankruptcy court granted plaintiffs relief from automatic stay and allowed them to proceed with this action.

the parties learned that Avantair had removed the engines originally installed on Defendants' Airplane and installed those engines on Plaintiffs' Airplane, leaving Defendants' Airplane with no engines as of the bankruptcy.[3] A dispute developed between plaintiffs and defendants regarding the ownership of the engines. Defendants claimed that they never consented to the removal of the engines from Defendants' Airplane and that plaintiffs had no ownership interest in the engines, so plaintiffs should return the engines to defendants.

The specific engines installed as original equipment as of 2003 on Defendants' Airplane bore serial numbers PCE-RK0088 on Engine A and PCE-RK0087 on Engine B[4]. In addition, maintenance records for Defendants' Airplane showed both Engines A and B were removed in 2007 to be overhauled because they had used up almost all of the flying hours allowed by FAA regulations. In November 2007, the refurbished Engine A was installed on one Avantair Program aircraft and refurbished Engine B was installed on another; the engines were not on either Plaintiffs' Airplane or Defendants' Airplane. The engines were again removed and refurbished in 2011, and both Engines A and B were installed on Plaintiffs' Airplane in February 2012.

On 4 November 2014, plaintiffs filed a complaint seeking a "declaratory judgment pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, . . . granting them possession of, control over, and marketable title to [Plaintiffs' Airplane][.]" In the alternative, plaintiffs sought "a declaration, pursuant to the Court's equitable power to quiet title to personal property, granting them possession of, control over, and marketable title to [Plaintiffs' Airplane]." Defendants filed an amended counterclaim on 20 May 2016 for conversion, trespass to chattel, and unjust enrichment, to which plaintiffs filed an answer on 31 May 2016.

On or about 24 June 2016, plaintiffs moved for summary judgment, arguing the court should enter a declaratory judgment that plaintiffs "are entitled to possession and control of, and marketable title to [Plaintiffs' Airplane], including all engines presently affixed to the aircraft[,]" and should dismiss defendants' counterclaims. Plaintiffs asserted there was no genuine issue of material fact and that they are entitled to judgment as a matter of law both on their affirmative claim and on defendants' counterclaims.

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3 Defendants' Airplane's original engines had been removed in 2007 to be overhauled, so those specific engines were not installed on Defendants' Airplane as of the dates on which some of the defendants purchased their fractional interests.

4 We will refer to the engines as Engine A and Engine B for ease of reading.

Defendants also moved for summary judgment on 24 June 2016 with an incorporated memorandum. Defendants alleged there were no genuine issues of material fact and requested that the court deny the relief sought by plaintiffs and enter summary judgment for defendants on their claims for conversion, trespass to chattel, and unjust enrichment, and that the court require plaintiffs to return the engines to defendants. Defendants argued that they were the owners of Engines A and B and that they had not transferred ownership rights to plaintiffs. A series of responses and replies ensued.

The trial court held a hearing on 2 September 2016 on the parties' cross-motions for summary judgment. Following the hearing, the trial court entered its Order on Cross-Motions for Summary Judgment on 21 September 2016. In the order, the court concluded:

> 1. The parties agree, and there is no issue of fact, that the operative documents between parties and Avantair, Inc. are identical in substance.
>
> 2. The language and terms of the Management & Dry Lease Exchange Agreement and the Aircraft Interest Purchase Agreement (collectively, the "Agreements") is plain and unambiguous. The effect to be given unambiguous language in a contract is a question of law for the Court. . . .
>
> 3. Based on the plain and unambiguous language of the Agreements, Plaintiff is entitled to Summary Judgment on its claim for declaratory judgment and Plaintiff is entitled to summary judgment as against Defendants' counter-claims.
>
> 4. Having concluded that the language of the Agreements is unambiguous, the Court need not consider extrinsic evidence of the parties' intent offered by each party; however, even if the Court were to conclude the Agreements were ambiguous and therefore consider competent extrinsic evidence of the parties' intent beyond the language of the Agreements, the Court concludes that the undisputed facts from such extrinsic evidence before the Court establishes that there is no genuine issue of material fact, and Plaintiffs would be entitled to Summary Judgment as a matter of law as to its claim for declaratory judgment and as against Defendants' counter-claims.

(Citations omitted).

The trial court granted plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment, dismissed defendants' counterclaims with prejudice, and concluded that defendants "have no claim to the engines currently attached to [Plaintiffs' Airplane] and Plaintiffs are entitled to possession and control of, and marketable title to, [Plaintiffs' Airplane], including all engines presently affixed to the aircraft." Defendants timely appealed to this Court.

Discussion

On appeal, defendants contend that the trial court erred in granting plaintiffs' motion for summary judgment and denying defendants' summary judgment motion. For the reasons that follow, we disagree.

I. Standard of Review

Defendants have appealed from the trial court's order granting summary judgment for plaintiffs, so we review the trial court's determination *de novo*:

> The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party.

Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citations and quotation marks omitted).

The issues here arise from interpretation of the various agreements entered into by the parties with Avantair. All of the documents regarding the Avantair Program designate Florida law as the governing law for interpretation of the documents. For example, the MDLA includes this provision: "Governing Law and Venue. The Program Documents shall be interpreted and governed by the laws of the State of Florida, without regard to its conflict of laws principles." Even though the parties have not mentioned Florida law, under N.C. Gen. Stat. § 8-4 (2017) we must take judicial notice of Florida law and use Florida law to resolve any substantive issues:

> [T]he contracts expressly provided that "this contract shall be construed according to the laws of the Commonwealth of Virginia." We, therefore, hold that the substantive issues in the present case are to be resolved under the law of Virginia, of which we are required to take judicial notice by G.S. 8-4. North Carolina law, however, governs the procedural matters.

Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 137, 252 S.E.2d 546, 550 (1979) (citation omitted). *See also Arnold v. Charles Enterprises*, 264 N.C. 92, 96, 141 S.E.2d 14, 17 (1965) ("Throughout, neither party has made any reference to the law of New York or that of Virginia, yet we are required to take judicial notice of foreign law. G.S. § 8-4."). Florida's rules of contract interpretation are essentially the same as North Carolina's, but since the controlling Avantair Program documents are entered under and to be interpreted under Florida law, we will use Florida law.

Just as in North Carolina, under Florida law, we consider questions of contract interpretation *de novo*. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. Dist. Ct. App. 2012) ("We may consider de novo whether contract terms are unambiguous.").

> Contract interpretation begins with a review of the plain language of the agreement because the contract language is the best evidence of the parties' intent at the time of the execution of the contract. In construing the language of a contract, courts are to be mindful that "the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose."
>
> When the terms of a contract are ambiguous, parol evidence is admissible to explain, clarify or elucidate the ambiguous terms. However, a trial court should not admit parol evidence until it first determines that the terms of a contract are ambiguous. If parol evidence is properly admitted and the parties submit contradictory evidence regarding their intent, then the trial court's factual findings regarding the parties' intent are reviewed for competent, substantial evidence.

Taylor v. Taylor, 1 So. 3d 348, 350-51 (Fla. Dist. Ct. App. 2009) (citations and quotation marks omitted).

> It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties

> or to relieve a party from what turns out to be a bad bargain. A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain.

Barakat v. Broward Cnty. Hous. Auth., 771 So. 2d 1193, 1195 (Fla. Dis. Ct. App. 2000) (citations omitted).

II. Language of the Subject Agreements: Plain and Unambiguous

[1] Defendants first argue that the language in the subject agreements was "not unambiguous," so the trial court erred in granting summary judgment because extrinsic evidence must be used to show the intent of the parties and this presents a jury question.

> An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect. Furthermore, a contract's language is ambiguous only if it is susceptible to more than one reasonable interpretation. A true ambiguity does not exist in a contract merely because the contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible.

Nabbie v. Orlando Outlet Owner, LLC, 237 So. 3d 463, 466-67, 2018 Fla. App. LEXIS 2023, at *5-6 (Fla. Dis. Ct. App. 2018) (citations, quotation marks, and brackets omitted).

Extrinsic evidence may be considered only if the contract terms are ambiguous.

> Florida courts have consistently declined to allow the introduction of extrinsic evidence to construe such an ambiguity because to do so would allow a trial court to rewrite a contract with respect to a matter the parties clearly contemplated when they drew their agreement. The end result would be to give a trial court free reign to modify a contract by supplying information the contracting parties did not choose to include.
>
> Indeed, the Supreme Court put it more bluntly in *Hamilton Constr. Co. v. Bd. of Pub. Instruction of Dade Cty.*, 65 So.2d 729, 731 (Fla. 1953): The parties selected the language of the contract. Finding it to be clear and

> unambiguous, we have no right -- nor did the lower court -- to give it a meaning other than that expressed in it. To hold otherwise would be to do violence to the most fundamental principle of contracts.

Clayton v. Poggendorf, __ So. 3d __, __, 2018 WL 992316, at *4-5 (Fla. Dist. Ct. App. Feb. 21, 2018) (No. 4D17-488) (citation and quotation marks omitted).

Defendants argue that the subject agreements are not "plain and unambiguous" because the agreements "do not clearly and unambiguously state that ownership of the subject engines is transferred upon affixation to another owners' aircraft." (All caps in original). Defendants argue that

> The plain reading of paragraph 7 allows the Manager (of the now defunct Avantair) to "upgrade, alter, or modify" to comply with FAA regulations, and provide for consistency among the Program aircraft. "At the owner's expense," at the very least, implies that the Manager would need to purchase "new" parts to replace the ones that needed to be replaced, or repair what needed to be repaired and the owner would be responsible for the cost of doing so, which would logically be . . . for the benefit of the owner. It does not provide Avantair with an authorization to "cannibalize" parts from one aircraft, and install them onto another aircraft and then call it theirs.

We first note that defendants do not argue that the agreements are ambiguous, but instead that they are "not plain and unambiguous." In addition, "[a] true ambiguity does not exist in a contract merely because the contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible." *Id.* at 467, 2018 Fla. App. LEXIS 2023 at *6 (citation, quotation marks, and brackets omitted). Defendant's double negative argument -- "not unambiguous" -- could be read as an argument that the agreements *are* ambiguous, so we will address it on that basis. But their argument is only that the agreements do not "state" that engines can be removed from one Avantair Program aircraft and installed on another. That is not so much an ambiguity but a lack of specificity -- or omission of a term that could have been included, but was not. Defendants focus on the phrase "at the Owner's expense" and interpret it to mean that new parts must always be purchased to replace old parts, including engines. But we may "not read a single term or group

of words in isolation." *Am. K–9 Detection Servs., Inc. v. Cicero*, 100 So. 3d 236, 238 (Fla. Dis. Ct. App. 2012). Defendants' interpretation of "at the Owner's expense" is not convincing, particularly since airplane maintenance involves much more than purchasing new parts. And under the MDLA, owners must pay for all maintenance, upgrades, alterations, or modifications. Defendants' argument also ignores the other provisions of the MDLA and the requirements of the FAA specifically referenced by the subject agreements. We must consider the agreements as a whole.

As noted above, the parties in the Avantair Program were subject to a variety of agreements -- Ownership Agreements, Purchase Agreements, and the MDLA. The Ownership Agreements "set forth [the Owners] understanding and agreement as to Interests and the ownership of the Aircraft." The purpose of the Ownership Agreements was to "set forth the agreement of the Owners regarding the management of the Aircraft[.]" The parties were also subject to the MDLA, which sets forth the terms for use of the Avantair Program aircraft and includes a section entitled "Covenants, Representations and Warranties of Manager;" Avantair was the Manager. The MDLA includes several relevant provisions regarding maintenance of the Avantair Program aircraft:

> 2. Maintenance. Manager shall (i) maintain the airworthiness certification of the Aircraft in good standing, (ii) arrange for the inspection, maintenance, repair and overhaul of the Aircraft in accordance with maintenance programs and standards established by the manufacturer of the Aircraft and approved by the FAA, (iii) keep the Aircraft in good operating condition, and (iv) maintain the cosmetic appearance of the Aircraft in a similar condition, except for ordinary wear and tear, as when delivered to the Owner. Manager agrees to maintain the enrollment of the specified engines in an FAA approved engine program.
>
> . . . .
>
> 7. Aircraft Modifications. Manager may, in its sole discretion, at Owner's expense, upgrade, alter or modify the Aircraft to (i) comply with Manager's interpretations of FAR; (ii) be consistent with industry standards, (iii) comply with, or otherwise permit the Aircraft to be operated under FAR Part 135, (iv) maintain the marketability of the Aircraft, or (v) provide for consistency in equipment, accessories or parts with respect to the Aircraft and any other program Aircraft.

. . . .

> 9. Compliance of Program with FARs. Manager shall be responsible for ensuring that the Program conforms to all applicable requirements of the FAR.

Under these provisions, Avantair had to maintain all Avantair Program aircraft in accord with the Federal Aviation Regulations (FAR) and specifically, to operate the aircraft in compliance with FAR Part 135. FAR Part 135 is 14 CFR Part 135, entitled "OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT." Defendants do not dispute that the FAR require routine engine maintenance and after a certain number of flying hours, engines must be entirely overhauled. Although the Avantair Program documents do not have a definition of "maintenance," they require compliance with the FAR ("Manager shall be responsible for ensuring that the Program conforms to all applicable requirements of the FAR."). FAR Part 1 includes a definition of "maintenance:" "Maintenance means inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance."[5] 14 CFR 1.1 - General definitions. Refurbishing an engine is "maintenance" under this definition.

On defendants' argument that the agreements require, or at least that the parties actually intended, that specific engines must remain on Defendants' Airplane, we note that the MDLA and Purchase Agreements for each airplane specifically identified the aircrafts only by the make, model, and tail number. The Ownership Agreements identified each aircraft by make, model, and tail number "together with engines, components, accessories, parts, equipment and documentation installed thereon or attached thereto or otherwise pertaining thereto (collectively, "the Aircraft")." None of the agreements mention any specific serial numbers or other identifying information for any engine or other component of Plaintiffs' and Defendants' Airplanes.

Defendants presented affidavits, including one from the Chief Operation Officer of Avantair which states his understanding of the Avantair Program documents. They argue that "the program documents did not allow for the transfer of ownership of any aircraft component parts." But because the documents are unambiguous, the trial court

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5. "Preventive maintenance means simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." 14 CFR 1.1.

correctly did not consider extrinsic evidence of how various people interpreted the Avantair Program documents.

Defendants additionally argue that Section VI, Paragraph 7 of the MDLA regarding "Modifications" was not clear or unambiguous and that it did not include the right to swap engines, as done in the Avantair Program. Paragraph 7 allowed Avantair "in its sole discretion, [to] upgrade, alter or modify the Aircraft to (i) comply with Manager's interpretations of FAR; (ii) be consistent with industry standards, (iii) comply with or otherwise permit the Aircraft to be operated under FAR Part 135." We must read this provision of the MDLA in conjunction with other provisions of the agreement which required Avantair to "(i) maintain the airworthiness certification of the Aircraft in good standing, (ii) arrange for the inspection, maintenance, repair and overhaul of the Aircraft in accordance with maintenance programs and standards established by the manufacturer of the Aircraft and approved by the FAA." Defendants do not dispute that the engines must be removed from an airplane when they have depleted their allowed flying hours and the engines must be overhauled. When engines are removed for maintenance, Avantair could either leave an airplane with no engines or install other engines on the airplane so it could continue to be used. And the MDLA contemplated that the Avantair Program aircraft would be properly maintained and available for use; that was the purpose of the Avantair Program.

In addition, nothing in the MDLA or other Avantair Program documents requires that a particular engine must stay on a particular aircraft. The engines could have been identified by serial number in the Ownership Agreements, Purchase Agreements, or MDLA, but they were not. The dispute here arose only because at the moment of Avantair's bankruptcy, Defendants' Airplane had no engines. Defendants purchased their fractional interests at different times, between the years of 2004 and 2013, so different engines -- or even no engines -- were installed on Defendants' Airplane when some defendants actually acquired their interests in that aircraft. If the parts actually installed on Defendants' Airplane at the moment of purchase were required to stay the same, the defendants who acquired a fractional interest in Defendants' Airplane when it had no engines at all would, by this logic, not be entitled to re-installation of Engines A and B; they would be entitled only to an airplane with no engines.

Both parties cite *In re Avantair, Inc.*, an unpublished decision of the Eleventh Circuit Court of Appeals involving the same fractional-owner Avantair Program, where the Eleventh Circuit affirmed an order of the Bankruptcy Court that "concluded that the program documents

unambiguously designed a fractional-ownership program, with each shareholder necessarily owning a share of a specific plane." *In re Avantair, Inc.*, 638 Fed. Appx. at 972, 2016 U.S. App. LEXIS 1758 at *5 (emphasis added). In *In re Avantair, Inc.*, the proposed plan required that each Avantair Program aircraft be sold and the proceeds distributed to each plane's fractional owners. *Id.* at 971-72, 2016 U.S. App. LEXIS 1758 at *2-4. As in this case, some of the aircraft were operational and in good repair at the time of the bankruptcy, while others were missing parts and of greatly reduced value. *Id.*, 2016 U.S. App. LEXIS 1758 at *3-4. Some of the owners whose planes were missing parts at the time of the bankruptcy contended that all of the owners had an interest in all of the Avantair Program aircraft, so all of the planes should be sold and the total proceeds from all of the planes be distributed to all of the owners in accord with their fractional interests. *Id.* This manner of distribution would increase the value distributed to the owners whose planes lacked parts at the time of bankruptcy. *Id.* at 972, 2016 U.S. App. LEXIS 1758 at *4. The bankruptcy court rejected this argument, finding that the Avantair Program documents executed by the participant-owners -- exactly the same documents as in this case -- "authorized Avantair to swap parts between planes to maximize the efficiency of the program." *Id.*, 2016 U.S. App. LEXIS 1758 at *5. The Eleventh Circuit affirmed and found no error with the Bankruptcy Court's conclusion that "[t]o the extent that Avantair failed to replace parts or maintain the donor planes, . . . the owners of such planes have a claim against Avantair (or the estate) for breaching its obligations to replace parts or maintain the donor planes but . . . the authorized swapping of parts did not and could not commingle the participants' ownership interests." *Id.*

An unpublished opinion from the Eleventh Circuit has no precedential effect even in the Eleventh Circuit, nor is it binding authority over this Court. *See* Eleventh Circuit Rule 36-2, Unpublished Opinions ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); *Enoch v. Inman*, 164 N.C. App. 415, 420, 596 S.E.2d 361, 365 (2004)) ("[T]he North Carolina Supreme Court has . . . held that North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court."). But *In re Avantair, Inc.* is helpful to our analysis. Defendants contend that it differs from this case because it involved the limited issue of how to distribute aircraft sale proceeds through bankruptcy, rather than the ownership of aircraft parts. Although the ultimate issue was not identical, as defendants claim in their brief on appeal, the Eleventh Circuit ultimately concluded that the subject Avantair Program documents "unambiguously designed a

fractional-ownership program, with each shareholder necessarily owning a share of a specific plane." *In re Avantair, Inc.*, 638 Fed. Appx. at 972, 2016 U.S. App. LEXIS 1758, at *5. And defendants further concede "the Bankruptcy Court found that, under certain circumstances, the program documents authorized Avantair to swap parts between planes to maximize the efficiency of the program[.]" The Eleventh Circuit's analysis of the Avantair Program documents is in accord with ours. The trial court correctly determined that the language and terms in the MDLA and Purchase Agreements "is plain and unambiguous" and that based on the subject agreements, plaintiffs are "entitled to Summary Judgment on [their] claim for declaratory judgment[.]"

Defendants next contend that the trial court should not have granted plaintiffs' summary judgment motion and denied defendants' motion, and argue that the court "also erred in determining that even if the language of the contract was ambiguous, the extrinsic evidence established there was no genuine issue of fact, and that Plaintiffs were entitled to judgment as a matter of law." As we have concluded that the trial court correctly determined that the contract was plain and unambiguous, we need not address this argument.

We hold that the trial court properly granted summary judgment for Plaintiffs based on the plain and unambiguous terms of the Avantair Program documents.

III. Counterclaims

[2] Defendants argue that the trial court erred in dismissing their counterclaims for conversion, trespass to chattels, and unjust enrichment. Although all these claims have slightly different elements, all require some form of unlawful or unauthorized taking of Engines A and B. Defendants argue that

> Avantair removed the original [Defendants' Airplane] engines without authorization, and affixed them to [plaintiffs'] aircraft as the company began to become insolvent, presumably in order to save costs. The transfer of possession was not subject to a sale or any form of consideration through Avantair's program documents. Those engines are the original component parts to the [Defendants' Airplane] aircraft belonging to [defendants].

Defendants also argue that "[a]s is the case with tires on an automobile, the original [Defendants' Airplane] engines did not become part of [Plaintiffs' Airplane] by virtue of their affixation thereto. In fact, aircraft

engines can be quickly removed and swapped, in order to avoid delay and prolonged grounding. They too are easily identifiable and serialized, and can be removed without damaging the donee aircraft." Their argument focuses on "ownership" of the engines as opposed to the ownership of the plane as a whole and contends that plaintiffs have done something wrongful or unjust by keeping the engines that had been on Defendants' Airplane.

According to defendants' argument, defendants own every part of Defendants' Airplane as it existed when it was originally acquired from the manufacturer by Avantair -- engines, tires, seats, cup holders, and everything else -- and each and every part that was on that plane must be returned to them because they own it. As the Eleventh Circuit noted in *Avantair*, defendants "invite[ ] us to resolve this variation on the Paradox of Theseus's Ship by answering a resounding 'yes' to [the question 'is your airplane now my airplane after my airplane's parts have been installed on yours?']"[6] *In re Avantair, Inc.*, 638 F. App'x at 971, 2016 U.S. App. LEXIS 1758 at *2. The Eleventh Circuit "decline[d the] invitation to drift into this philosophical turbulence," and so do we. *Id.* Whatever the answer to the Paradox of Theseus's Ship, the Avantair Program documents controlled the maintenance of the Avantair Program aircraft, so defendants have not shown that plaintiffs did anything unlawful, unauthorized, in bad faith, or inequitable by having the engines that had been on Defendants' Airplane at the moment Avantair was forced into bankruptcy. Avantair was performing its job as Manager -- perhaps poorly, since it led to bankruptcy -- in compliance with the Avantair Program documents by removing the engines from Defendants' Airplane for maintenance and by later installing them on Plaintiffs' Airplane. When bankruptcy was filed, the music stopped in Avantair's game of musical chairs -- or musical engines -- and defendants ended up without a chair. Defendants have not shown that plaintiffs acted in any way not authorized by the Avantair Program documents, so their counterclaims for conversion, trespass to chattels, and unjust enrichment must fail. The trial court did not err by denying defendants' motion for summary judgment and dismissing their counterclaims.

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6. The Paradox of Theseus's Ship was first described by Greek historian Plutarch: "The ship wherein Theseus and the youth of Athens returned from Crete had 30 oars, and was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their places, in so much that this ship became a standing example among the philosophers, for the logical question of things that grow; one side holding that the ship remained the same, and the other contending that it was not the same." Plutarch, Theseus, as translated by John Dryden.

Conclusion

We affirm the trial court's order granting summary judgment for plaintiffs and denying defendants' request for summary judgment.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
SAMUEL CALLEROS ALVAREZ

No. COA17-945

Filed 7 August 2018

Drugs—felony maintaining a vehicle—keeping or selling drugs—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the felony charge of maintaining a truck for the purpose of keeping or selling cocaine based on the totality of the circumstances, which included defendant's exclusive use of and control over the truck, that defendant constructed and knew about the false-bottomed compartment in the back of the truck in which law enforcement discovered one kilogram of cocaine, and that this was not an isolated incident.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 13 January 2017 by Judge Richard Kent Harrell in Lenoir County Superior Court. Heard in the Court of Appeals 5 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anne Goco Kirby, for the State.

Anne Bleyman, for defendant-appellant.

CALABRIA, Judge.

Samuel Calleros Alvarez ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felony maintaining a vehicle for keeping or selling controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7) (2017). After careful review, we conclude that defendant received a fair trial, free from error.

I. Factual and Procedural Background

In January 2015, the Lenoir County Sheriff's Office ("LCSO") planned a controlled "buy-bust" after a confidential source informed Detective Sergeant Jovani Villagra that Miguel Goicochea-Medina was trying to sell a kilogram of cocaine. The informant placed a recorded phone call to Goicochea-Medina, who agreed to sell the informant one kilogram of cocaine for $41,500.00. The parties agreed to meet in the parking lot of a Walmart in Kinston, North Carolina, on 23 January 2015 to conduct the transaction.

On 23 January 2015, Sergeant Villagra and the confidential informant drove separately to the Walmart parking lot and waited for Goicochea-Medina to arrive. At approximately 4:00 p.m., Goicochea-Medina and defendant arrived together in a white Nissan pickup truck. Although Goicochea-Medina was driving, the vehicle was registered to defendant's wife, and defendant used the truck in his work as a carpenter. Upon their arrival, both men exited the truck. After Sergeant Villagra repeatedly requested to see "the product," Goicochea-Medina deferred to defendant, who informed him that "it was in the back of the pickup truck in a compartment." Sergeant Villagra continued to press the men to produce the cocaine. He told the men that he had the $41,500.00 and showed them a cooler full of cash. Defendant responded that they needed "to go to the house" in order to unload the truck and access the cocaine, because he did not want to do it in the Walmart parking lot. Sergeant Villagra instructed the men to follow him, and then exited the parking lot in his vehicle. Goicochea-Medina followed Sergeant Villagra in the pickup truck, and defendant opted to ride with the confidential informant.

While the men were en route to "the house," LCSO officers stopped the pickup truck and placed defendant and Goicochea-Medina under arrest. When a canine unit alerted to the presence of drugs, officers searched the bed of the truck. The truck contained a large quantity of tools and was outfitted with wooden flooring, drawers, compartments, and paneling. Underneath the tools, the officers discovered a small, covered compartment in the far left corner of the floor, near the cab. After uncovering the compartment's false bottom, the officers discovered one kilogram of cocaine wrapped in plastic and oil.

Defendant was subsequently indicted for trafficking in cocaine by possession of 400 grams or more; trafficking in cocaine by delivery; trafficking in cocaine by transportation; conspiracy to traffic by possessing, transporting, selling, or delivering more than 400 grams of cocaine; and felony maintaining a vehicle for keeping or selling controlled substances. On 9 January 2017, a jury trial commenced in Lenoir County Superior Court. Defendant moved to dismiss all charges at the close of the State's evidence, and he renewed the motion following his own presentation of evidence. The trial court denied defendant's motions to dismiss, but ruled that trafficking in cocaine by delivery would be submitted to the jury as an attempt charge. On 13 January 2017, the jury found defendant guilty of all charges except attempted trafficking in cocaine by delivery. The trial court sentenced defendant to 175 to 222 months in the custody of the North Carolina Division of Adult Correction and ordered him to pay a $250,000.00 fine.

Defendant appeals.

II. Motion to Dismiss

Defendant's sole argument on appeal is that the trial court erred by denying his motion to dismiss the charge of felony maintaining a vehicle for keeping or selling controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7). Specifically, defendant contends that the State presented insufficient evidence that he kept or maintained his pickup truck "over a duration of time" for the purpose of keeping or selling cocaine. We disagree.

A. Standard of Review

In reviewing a criminal defendant's motion to dismiss, the question for the trial court "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[T]he trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Id. (citation and quotation marks omitted). We review the trial court's denial of a criminal defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Discussion

N.C. Gen. Stat. § 90-108(a)(7) makes it unlawful for any person

> [t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of [the North Carolina Controlled Substances Act] for the purposes of using such substances, or which is used for the keeping or selling of the same in violation of [the North Carolina Controlled Substances Act].

By its plain language, N.C. Gen. Stat. § 90-108(a)(7) provides "two theories under which the State may prosecute a defendant . . . ." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). In the instant case, the State prosecuted defendant under the second theory, which requires proof "that the defendant did (1) knowingly (2) keep or maintain (3) a vehicle (4) which is used for the keeping or selling (5) of controlled substances." *Id.*

N.C. Gen. Stat. § 90-108(a)(7) "does not prohibit the mere temporary possession of [a controlled substance] within a vehicle." *Id.* at 32-33, 442 S.E.2d at 30. The word "keep" "denotes not just possession, but possession that occurs over a duration of time." *Id.* at 32, 442 S.E.2d at 30; *see also id.* at 32, 442 S.E.2d at 29-30 (noting various definitions of the word "keep," including: "to have or retain in one's power or possession"; "not to lose or part with"; "to preserve or retain"; and "to maintain continuously and methodically" (alterations and citation omitted)).

"The determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *Id.* at 34, 442 S.E.2d at 30. In making this determination, courts consider a variety of factors, including occupancy of the property; possession over a duration of time; the presence of large amounts of cash or drug paraphernalia; and the defendant's admission to selling controlled substances. *State v. Frazier*, 142 N.C. App. 361, 365, 366, 542 S.E.2d 682, 686 (2001). No factor is dispositive. *Id.* However, "[t]he focus of the inquiry is on the *use*, not the contents, of the vehicle." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30. "Although the contents of a vehicle are clearly relevant in determining its use, its contents are not dispositive when . . . they do not establish that the use of the vehicle was a prohibited one." *Id.*

On appeal, defendant contends that the State presented insufficient evidence that he kept or maintained his truck "over a duration of time" for the purpose of keeping or selling cocaine. We disagree.

It is true that much of our case law interpreting N.C. Gen. Stat. § 90-108(a)(7) has turned on similar arguments. *E.g.*, *id.* at 32-33, 442 S.E.2d at 30; *State v. Dunston*, __ N.C. App. __, __, 806 S.E.2d 697, 699 (2017) (rejecting the defendant's argument that "our case law establishes a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance"), *aff'd per curiam*, __ N.C. __, 813 S.E.2d 218 (2018). Nevertheless, "[t]he totality of the circumstances controls, and whether there is sufficient evidence of the 'keeping or maintaining' element depends on several factors, *none of which is dispositive*." *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (emphasis added), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010).

In the instant case, the totality of the circumstances supports a reasonable inference that defendant knowingly kept or maintained the truck for the purpose of keeping or selling cocaine. Although the vehicle was registered in his wife's name, defendant described it as "[his] truck." Defendant admitted that it was his work vehicle, that no other party used it, and that he built the wooden drawers and compartments located in the back of the cab. In conducting a lawful search of the vehicle, LCSO officers discovered a false-bottomed compartment on the truck bed floor, hidden underneath "a bunch of tools." Except for a small hole in the center of the plywood, the compartment's concealed lid "looked just like a regular bottom." Underneath the false bottom, officers discovered a four- to six-inch "void" containing one kilogram of cocaine.

The cocaine was wrapped in plastic and oil to evade detection by canine units.

Defendant does not challenge the sufficiency of the evidence supporting his various trafficking convictions arising from this incident. Moreover, substantial evidence supports that defendant knowingly participated in the transaction in the Walmart parking lot immediately prior to his arrest, and that this was not an isolated incident. After Sergeant Villagra asked to see "the product," Goicochea-Medina deferred to defendant, who indicated that the cocaine was in a compartment in the back of the truck. Sergeant Villagra showed the men a cooler full of cash and told them that "next time [he] want[ed] a cheaper price" than $41,500.00. However, defendant refused to produce the cocaine in the Walmart parking lot. At trial, the State presented an audio recording of the transaction in which defendant repeatedly insisted that they "go to the house" to unload the truck. The confidential informant testified that, on the way to "the house," defendant questioned him about his prior experiences with Sergeant Villagra and indicated that they could continue selling drugs together "if everything worked out well[.]"

Taken in the light most favorable to the State, the evidence showed, generally, that defendant exercised regular and continuous control over the truck; that he constructed and knew about the false-bottomed compartment in which one kilogram of cocaine—an amount consistent with trafficking, not personal use— was discovered on 23 January 2015; that he was aware that cocaine was hidden in his truck and willingly participated in the transaction in the Walmart parking lot; and that he held himself out as responsible for the ongoing distribution of drugs like those discovered in the truck. *Cf. Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30 ("The evidence, including defendant's actions, the contents of his car, and the contents of his home, are entirely consistent with drug use, or with the sale of drugs generally, but they do not implicate the car with the sale of drugs.").

This evidence is sufficient for a reasonable juror to infer, from the totality of the circumstances, that defendant knowingly kept or maintained the pickup truck for the purpose of keeping or selling cocaine. Therefore, the trial court did not err by denying defendant's motion to dismiss the charge of felony maintaining a vehicle for keeping or selling controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7).

NO ERROR.

Judge MURPHY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

I respectfully dissent and would reverse the trial court's denial of Defendant's motion to dismiss and vacate Defendant's conviction pursuant to N.C. Gen. Stat. § 90-108(a)(7) (2017).

N.C.G.S. § 90-108(a)(7) states that it is unlawful to "knowingly keep or maintain any . . . vehicle . . . for the keeping or selling of [controlled substances.]" Under this provision, the State must prove "that the defendant did (1) knowingly (2) keep or maintain (3) a vehicle (4) which is used for the keeping or selling ([5]) of controlled substances." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). Our Supreme Court held in *Mitchell* that:

> The word "keep" is variously defined as follows: "[to] have or retain in one's power or possession; not to lose or part with; to preserve or retain . . . . To maintain continuously and methodically . . . . To maintain continuously and without stoppage or variation . . . [; t]o take care of and to preserve . . . ." "Keep" therefore denotes not just possession, but possession that occurs *over a duration of time*. By its plain meaning, therefore, this statute does not prohibit the mere temporary possession of marijuana within a vehicle. . . . That an individual within a vehicle possesses marijuana on one occasion *cannot* establish that the vehicle is "used for keeping" marijuana[.]

Id. at 32-33, 442 S.E.2d at 29-30 (internal citation omitted) (emphasis added).

In *State v. Dunston*, ___ N.C. App. ___, 806 S.E.2d 697 (2017), *aff'd per curiam*, ___ N.C. ___, 813 S.E.2d 218 (2018), this Court rejected the defendant's argument that "our case law establishes a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance." *Dunston*, ___N.C. App. at ___, 806 S.E.2d at 699. Instead, this Court held that "[t]he determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *Id.* (citing *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30).

Under the totality of the circumstances in this case, there was insufficient evidence that Defendant kept or maintained his vehicle over a

duration of time to keep or sell controlled substances. This Court has looked at a variety of factors to determine whether a defendant was keeping or maintaining their vehicle for the purpose of keeping or selling a controlled substance. *See State v. Rogers*, ___ N.C. App. ___, 796 S.E.2d 91 (2017) (amount of time the defendant was in control of the vehicle, ownership of the vehicle); *Dunston*, ___ N.C. App. ___, 806 S.E.2d 697 (location of vehicle, quantity of controlled substances, drug paraphernalia consistent with the sale of controlled substances, amount of money in the car); *State v. Rousseau*, ___ N.C. App. ___, 793 S.E.2d 292 (2016) (unpublished) *aff'd per curiam*, 370 N.C. 268, 805 S.E.2d 678 (2017) (location of the drugs within the vehicle, presence of drug remnants within the vehicle). No single factor is dispositive of the issue. *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010).

In the case before us, the evidence at trial showed Defendant knew the location of the cocaine within the truck, the cocaine was hidden within a compartment in the bed of Defendant's work truck, and the cocaine was wrapped in plastic and coated in oil. While this evidence was sufficient to show Defendant engaged in this sale of drugs, there was insufficient evidence presented that Defendant was keeping or maintaining the vehicle for that purpose "over a duration of time" as required by *Mitchell*. *Mitchell*, 336. N.C. at 32, 442 S.E.2d at 30. *See State v. Rogers*, ___ N.C. App. ___, 796 S.E.2d 91 (2017) (reversing the denial of a motion to dismiss where the defendant maintained possession of vehicle for one-and-a-half hours prior to arrest and there was no evidence showing that the defendant had used the vehicle to keep or sell controlled substances on prior occasions). In the present case, Defendant was not in control of the vehicle at the time of the attempted drug sale. The kilogram of cocaine was in a single package, rather than a size typical of individual sales. There was no testimony that Defendant's vehicle contained any other items associated with the sale of drugs, nor contained a significant amount of money.

The majority states that Defendant "held himself out as responsible for the ongoing distribution of drugs[.]" However, the only evidence presented supporting that assertion was testimony from the confidential informant stating Defendant said during the drug sale that "if everything worked out well we could keep working together." While this statement might support that Defendant had the intent to possibly keep or maintain the vehicle for the purpose of selling drugs in the future, Defendant's statement was conditional and does not support that he was doing so at the time of his arrest. The evidence presented does no more than raise "suspicion or conjecture" that Defendant was "keeping or maintaining"

the vehicle for the purpose of keeping or selling drugs. *State v. Alston*, 310 N.C. 399, 404, 213 S.E.2d 470, 473 (1984) ("If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion to dismiss should be allowed."). Because the State failed to meet its burden, Defendant's motion to dismiss should have been granted.

STATE OF NORTH CAROLINA
v.
MARLON LOUIS BARTLETT

No. COA17-1178

Filed 7 August 2018

1. Search and Seizure—consensual search—coercive environment—race

Defendant's consent to a pat-down search following a traffic stop, which revealed heroin, was voluntary where defendant gave the officer permission to search. Although defendant contended that he consented only in acquiescence to a coercive environment in which his race was a factor, there was no showing in this case that defendant's consent was involuntary other than studies indicating that any police request to search will be seen by people of color as an unequivocal demand to search to be disobeyed only at significant risk. The totality of the circumstances showed that defendant consented freely and voluntarily and not just to avoid retribution.

2. Search and Seizure—scope of consent—pat down—genitalia

A pat-down of defendant's groin, which revealed heroin, was constitutionally tolerable pursuant to his consent to a search of his person following a traffic stop. A reasonable person in defendant's circumstances would have understood the consent to include the sort of limited outer pat-down performed in this case.

3. Search and Seizure—seizure—detention continued after pat-down—plain feel doctrine

An officer at a traffic stop had a reasonable suspicion to detain defendant further under the totality of the circumstances after a pat-down revealed "obvious contraband" concealed inside defendant's clothes.

4. Constitutional Law—Miranda warning—traffic stop—pat-down —question concerning object in clothes

Evidence seized at a traffic stop after a pat-down and a question about the contents of defendant's underwear but before defendant was given a *Miranda* warning did not need to be suppressed where there was no evidence to suggest that defendant had been coerced when he gave his consent to the search.

Appeal by defendant from order entered 14 March 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

Warren D. Hynson for defendant-appellant.

ZACHARY, Judge.

Defendant Marlon Louis Bartlett appeals from the trial court's order denying his Motion to Suppress. For the reasons contained herein, we affirm.

Background

Defendant was indicted for two counts of trafficking heroin following a search of his person during a traffic stop. Defendant moved to suppress the heroin on the grounds that it was obtained as the result of an unlawful search, which the trial court denied. The facts pertaining to the search are largely undisputed:

On 30 May 2013, Officer McPhatter, a tactical narcotics officer with the Greensboro Police Department, was patrolling the High Point Road area in an unmarked vehicle. Officer McPhatter noticed a Lincoln sedan weaving in and out of heavy traffic at a high rate of speed, nearly causing multiple collisions. The Lincoln then pulled into a Sonic Drive-In parking lot next to an unoccupied Honda.

Officer McPhatter continued surveilling the Lincoln. Defendant, who was riding in the back passenger seat, exited the Lincoln and approached the Honda. Defendant placed his hand inside the passenger window of the Honda, though Officer McPhatter could not discern whether Defendant took anything from the car. The driver of the Honda appeared and spoke with Defendant for a few seconds. Defendant then

returned to the Lincoln, and he and the other occupants drove away. No one in the Lincoln had ordered any food. Based on his roughly eighteen months of working as a tactical narcotics officer and having observed over 200 drug deals, Officer McPhatter concluded that Defendant had just participated in a drug transaction.

While other officers in the unit watched, the Lincoln next proceeded to a Shell gas station. Officer Randazzo radioed that the Lincoln continued to be driven in a careless and reckless manner, at an estimated fifteen miles per hour over the speed limit. After leaving the Shell gas station, Officer McPhatter stopped the Lincoln for reckless driving and speeding. Officers Randazzo, Farrish, Hinkle, and Hairston also participated in the stop. All five officers were in full uniform as they approached the Lincoln.

Officer McPhatter approached the passenger's side of the vehicle while Officer Hairston and Officer Farrish approached the driver's side. As he neared the vehicle, Officer McPhatter noticed Defendant reach toward the floorboard. Because he did not know whether Defendant had a weapon or was attempting to conceal contraband underneath the seat, Officer McPhatter asked Defendant to show his hands. Defendant raised his hands, which were daubed with a light pink substance that Defendant stated was fabric softener. Officer McPhatter ordered Defendant out of the vehicle and asked Defendant "if he was attempting to conceal something inside the vehicle or on his person." Defendant told Officer McPhatter "that was not the case and that he did not have anything illegal on his person." Officer McPhatter testified that "At that time I asked [Defendant] for consent to search his person, which he granted me by stating, Go ahead." However, Defendant testified that he never gave Officer McPhatter permission to conduct a search.

Officer McPhatter testified that when he proceeded to pat Defendant down, "I noticed a large—a normal—larger than normal bulge near the groin area that's not consistent with like male parts." Officer McPhatter detained Defendant in handcuffs at that point because "It was obvious to me in that he had some kind of contraband on his person." Officer McPhatter "asked [Defendant] if he had anything inside his underwear," and Defendant said that he did. Officer McPhatter then asked Defendant "if he'd retrieve—retrieve the item for me and he told me that he would do so." Officer McPhatter removed the handcuffs from Defendant, and Defendant reached into his pants and produced a single plastic bag containing heroin. Defendant was placed under arrest. Officer McPhatter testified that "maybe five minutes" had passed from the time he pulled

the Lincoln over to the time Defendant pulled the bag of heroin out of his underwear.

After hearing Defendant's Motion to Suppress, the trial court adopted Officer McPhatter's version of events and found that Defendant had consented to the search. The trial court denied Defendant's Motion to Suppress, reasoning:

> Officer McPhatter had reasonable suspicion to stop the Lincoln for the traffic offenses observed. He had reason to ask Defendant to show his hands (for officer safety) after he observed Defendant reach toward [the] floorboard. He had reason to inquire about whether Defendant was trying to conceal anything or had anything illegal (based on movement in car and what he observed at Sonic with Honda). Defendant gave him permission to search. Even if he hadn't, officer was justified in patting Defendant down (frisk for weapons). And once he observed the bulge in Defendant's groin, he was justified in asking him about it and searching further.

Defendant thereafter pleaded guilty to two counts of trafficking heroin, while reserving his right to appeal the suppression ruling. The trial court sentenced Defendant to 90 to 120 months' imprisonment. Defendant appeals, challenging the trial court's order denying his Motion to Suppress.

Standard of Review

In considering the trial court's denial of a defendant's motion to suppress, our review is limited to determining whether "the trial court's findings of fact are supported by competent evidence and whether those findings support its conclusions of law." *State v. King*, 206 N.C. App. 585, 587, 696 S.E.2d 913, 914 (2010) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

Discussion

Defendant contends that "the trial court erroneously concluded Officer McPhatter was justified in frisking [Defendant] for weapons when there was no evidence he was armed and dangerous." Defendant also argues that his consent did not render the search permissible (1) because it was not voluntary, and (2) because even if it was voluntary, Officer McPhatter's pat-down of Defendant's groin area exceeded the scope of his consent. Lastly, Defendant argues that "the trial court's conclusion that Officer McPhatter was justified in asking [Defendant] about

suspected contraband and searching him further was not supported by the findings of fact or evidence."

I.

[1] We first address Defendant's argument that his consent cannot properly serve as a justification for the search in the instant case. Defendant maintains that he consented only in acquiescence "to the coercive environment fostered by the police[,]" and that the trial court erred when it denied his Motion to Suppress the evidence obtained therefrom. However, we cannot agree.

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "[A] governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement[.]" *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620. One such exception to the warrant requirement exists "when the search is based on the consent of the detainee." *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973) and *State v. Belk*, 268 N.C. 320, 322, 150 S.E.2d 481, 483 (1966)).

To be valid, however, a defendant's consent must have been voluntary. *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967). That is, the State must demonstrate that the consent was "not the result of duress or coercion, express or implied." *Bustamonte*, 412 U.S. at 248, 36 L. Ed. 2d at 875. It is well settled that "[t]o be voluntary the consent must be unequivocal and specific, and freely and intelligently given[,]" rather than having been "given merely to avoid resistance." *Little*, 270 N.C. at 239, 154 S.E.2d at 65 (citations and quotation marks omitted).

" 'The question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of the circumstances.' " *State v. Brown*, 306 N.C. 151, 170, 293 S.E.2d 569, 582, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) (quoting *Bustamonte*, 412 U.S. at 227, 36 L. Ed. 2d at 862-63). The State is not required to demonstrate that a defendant knew that he had a right to refuse the search in order to establish that his consent was voluntary under the totality of the circumstances. *Bustamonte*, 412 U.S. at 249, 36 L. Ed. 2d at 875. However, "the subject's knowledge of a right to refuse is a factor to be taken into account[.]" *Id.* For instance, our Supreme Court has explained that

whether the defendant "was a young and inexperienced person" may be of relevance. *Little*, 270 N.C. at 240, 154 S.E.2d at 65. Otherwise, "the conditions under which the consent to search was given[,]" *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (citations omitted), are reviewed in order to determine whether there is "evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place." *Bustamonte*, 412 U.S. at 247, 36 L. Ed. 2d at 874.

In the instant case, Defendant contends that his race is highly relevant to the determination of whether he voluntarily consented to the search, in that "there is strong evidence that people of color will view a 'request' to search by the police as an inherently coercive command." In support of his argument, Defendant cites various studies which tend to indicate that for people of color in general, "any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm." Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 243 (2002). Accordingly, Defendant urges that his race "gives pause as to whether the consent" in the instant case was "genuinely voluntary."

Defendant is correct that his race may be a relevant factor in considering whether his consent was voluntary under the totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 558, 64 L. Ed. 2d 497, 512 (1980) (citation omitted). However, beyond the studies to which he refers, the record is devoid of any indication that *Defendant's* individual consent in this particular case was involuntary. *See id.* ("While these [race] factors were not irrelevant, neither were they decisive[.]") (citation omitted). To the contrary, the overall circumstances presented at the suppression hearing tended to show that Defendant consented "freely and intelligently[,]" and not "merely to avoid resistance." *Little*, 270 N.C. at 239, 154 S.E.2d at 65 (citations and quotation marks omitted).

While multiple officers were present on the scene, Officer McPhatter was the only officer who interacted with Defendant. *See State v. Cobb*, ___ N.C. App. ___, ___, 789 S.E.2d 532, 539 (2016) ("Although there were four officers present at defendant's residence, only two . . . were speaking with defendant when he initially gave consent to search his room."); *see also State v. McDaniels*, 103 N.C. App. 175, 184, 405 S.E.2d 358, 364 (1991) (citing *State v. Fincher*, 309 N.C. 1, 25, 305 S.E.2d 685, 700 (1983) (Exum, J., dissenting)) ("Defendant makes much of the fact that there were a number of officers at the scene; however, our Supreme Court has refused to hold that police coercion exists as a matter of law even when ten or more officers are present . . . before the suspect consents to

a search."). When Officer McPhatter approached the Lincoln, he asked Defendant whether he "had anything illegal on [him]." Defendant said that he did not. Upon competent evidence, the trial court found that Officer McPhatter then asked if he could conduct a search of Defendant's person, to which Defendant responded, "go ahead." Defendant testified that he and Officer McPhatter had "no other conversation." At no point did Defendant testify that he was unaware of his ability to refuse Officer McPhatter's request, or that he feared retribution had he elected to do so. Moreover, the record contains no indication that Officer McPhatter "made threats, used harsh language, or raised [his] voice[] at any time during the encounter." *Cobb*, ___ N.C. App. at ___, 789 S.E.2d at 539. There was also no evidence "that any of the officers ever made physical contact with [D]efendant" before asking for his consent to search. *Id.* Each of the officers' firearms remained holstered throughout the encounter. *See McDaniels*, 103 N.C. App. at 184, 405 S.E.2d at 364. Based on these circumstances, we cannot conclude that Defendant's consent was involuntary, and we affirm the trial court's conclusion that Defendant's permission justified Officer McPhatter's search.

II.

[2] Defendant next argues that "the scope of [his] consent to a search of his person did not include a frisk of his private parts, and lacking probable cause or exigent circumstances to justify such a search, [Officer] McPhatter's pat-down of [Defendant's] groin area was constitutionally intolerable." However, because we conclude that Defendant's consent encompassed the sort of limited frisk that was performed in the instant case, neither probable cause nor exigency was required to justify the search.

Voluntary consent to a search does not permit an officer to embark upon an unfettered search free from boundary or limitation. *See State v. Stone*, 362 N.C. 50, 54, 653 S.E.2d 414, 417 (2007) (citing *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991)). Rather, "[a] suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant." *Id.* at 54, 653 S.E.2d at 417-18 (quoting *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir. 1985)). And "[e]ven when an individual gives a general consent without express limitations, the scope of a permissible search has limits." *Id.* at 54, 653 S.E.2d at 418 (citing *United States v. Blake*, 888 F.2d 795, 800-01 (11th Cir. 1989)). In such a case, the limit on the search is that of reasonableness—that is, "what the reasonable person would expect." *Id.* (citing *Blake*, 888 F.2d at 800-01). Our Supreme Court has clearly stipulated that " '[t]he standard for measuring the scope

of a suspect's consent . . . is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?' " *Id.* at 53, 653 S.E.2d at 417 (quoting *Jimeno*, 500 U.S. at 250-51, 114 L. Ed. 2d at 302).

Accordingly, to determine whether Defendant's general consent to a search of his person encompassed a pat-down of the area of his genitalia, "we consider whether a reasonable person would have understood his consent to include such an examination." *Id.* at 54, 653 S.E.2d at 417 (citing *Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302).

Defendant cites *State v. Stone* for the proposition that a "reasonable individual would not understand [the individual's] consent to a search of his or her body to include an officer touching his or her genitalia." In *Stone*, "the officer pulled [the] [d]efendant's sweatpants away from his body and trained his flashlight on [the] [d]efendant's groin area[,]" at which point the defendant immediately objected, "Whoa." *Id.* at 55, 653 S.E.2d at 418. Our Supreme Court concluded that "a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals." *Id.* at 56, 653 S.E.2d at 418-19 (citation omitted). In so concluding, the Supreme Court focused on the fact that the officers did not shield the defendant's exposure from public view, and noted that the defendant's immediate objection was relevant to the overall analysis of whether the officer's conduct had exceeded the bounds of ordinary societal expectations. *Id.* at 55-56, 653 S.E.2d at 418-19. The Court also examined several federal cases that "disapproved" of "search[es] involving direct frontal touching of a suspect's genitals[.]" *Id.* at 56, 653 S.E.2d at 418 (citing *Blake*, 888 F.2d at 800-01, and *United States v. Rodney*, 956 F.2d 295, 298 (D.C. Cir. 1992)) (quotation marks omitted).

In the instant case by contrast, we believe that Officer McPhatter's pat-down over Defendant's groin area was within the bounds of what a reasonable person would have expected the search to include. Officer McPhatter limited his pat-down to the outer layer of Defendant's clothing. He did not reach into Defendant's pants in order to search his undergarments or directly touch his groin area. *Cf. Stone*, 362 N.C. at 54-55, 653 S.E.2d at 418 (quoting *Blake*, 888 F.2d at 797, 800-01) (" '[I]t cannot be said that a reasonable individual would understand that a search of one's person would . . . entail' " the officer "reach[ing] into [the defendant's] groin region where he did a 'frontal touching[.]' "). Officer McPhatter also did not expose Defendant to either himself or the public. *See State v. Smith*, 118 N.C. App. 106, 118, 454 S.E.2d 680, 687

(Walker, J., concurring and dissenting), *rev'd*, 342 N.C. 407, 464 S.E.2d 45 (1995). Nor does the record reveal—through either video or testimonial evidence—that the pat-down of Defendant's groin area was otherwise conducted in an unreasonably offensive manner. Moreover, Officer McPhatter asked for Defendant's consent to search after inquiring into whether "he was attempting to conceal something . . . on his person[,]" thus reasonably alerting Defendant to the fact that the search would likely include areas in which such items might immediately be hidden.

Based on these circumstances, we conclude that a reasonable person in Defendant's position would have understood his consent to include the sort of limited outer pat-down that was performed in the instant case. Accordingly, the trial court did not err when it denied Defendant's Motion to Suppress on the grounds that Defendant gave his "permission to search."

Because we conclude that Defendant's Motion to Suppress was properly denied in light of Defendant's valid consent, we need not address Defendant's argument that the trial court erred when it concluded that Officer McPhatter was also "justified in frisking [Defendant] for weapons when there was no evidence he was armed and dangerous."

III.

[3] Notwithstanding his consent, Defendant argues that Officer "McPhatter's continued detention of [Defendant] after searching his groin area to 'find out' what contraband may have been in [Defendant's] pants was not justified by the plain feel doctrine." This argument is unpersuasive.

Officer McPhatter's pat-down of Defendant was lawful by virtue of Defendant's consent. At that point, Officer McPhatter felt a bulge that he judged was "not consistent with . . . male parts[,]" and "was obvious[ly]" contraband. When coupled with the totality of the circumstances already observed by Officer McPhatter, this discovery amounted to reasonable suspicion justifying Officer McPhatter's further detention of Defendant in order to question him about the contents of his pockets. *See New Jersey v. T.L.O.*, 469 U.S. 325, 347, 83 L. Ed. 2d 720, 738 (1985); *State v. Johnson*, 246 N.C. App. 677, 693, 783 S.E.2d 753, 765 (2016).

[4] Lastly, Defendant argues that

> By handcuffing [Defendant] and not allowing him to leave, McPhatter restrained [Defendant's] liberty to the degree associated with formal arrest. Thus, before questioning [Defendant] further, McPhatter was required to inform

> [Defendant] of his *Miranda* rights. McPhatter did not do so. [Defendant's] statement admitting that he had something in his underwear, in response to McPhatter's custodial questioning, was the product of coercion, obtained in violation of *Miranda*, and the evidence obtained from this constitutional violation should have been suppressed. The trial court erred in denying [Defendant's] motion to suppress.

"The *Miranda* warnings are a prophylactic standard used to safeguard the privilege against self-incrimination. The exclusionary rule in such a case is applied differently than it is applied in a case in which a person's constitutional rights are violated such as by an illegal search and seizure." *State v. May*, 334 N.C. 609, 612, 434 S.E.2d 180, 182 (1993). "If the record shows there was no actual coercion but only a violation of the *Miranda* warning requirement," physical evidence seized as a result of the otherwise uncoerced statement need not be suppressed. *Id.*

In the instant case, and for the same reasoning explained in Section I, *supra*, the record contains no evidence which would otherwise suggest that Defendant had been coerced when he admitted to Officer McPhatter that he had something in his underwear and handed over the narcotics. Thus, a *Miranda* violation would not require suppression of the narcotics ultimately retrieved.

Accordingly, we find no error in the trial court's denial of Defendant's Motion to Suppress.

Conclusion

For the reasoning contained herein, the trial court's order denying Defendant's Motion to Suppress is

AFFIRMED.

Judges ELMORE and TYSON concur.

STATE v. BASKINS

[260 N.C. App. 589 (2018)]

STATE OF NORTH CAROLINA
v.
GREGORY CHARLES BASKINS, DEFENDANT

No. COA17-1327

Filed 7 August 2018

1. Judges—overruling another judge—prohibition against—inapplicable to motions for appropriate relief

The trial court in a drug trafficking case erred by denying defendant's motion for appropriate relief (MAR) on the grounds that it would impermissibly require him to overrule another superior court judge's order denying defendant's motion to suppress. The rule that one superior court judge may not overrule another is generally inapplicable to MARs, and the trial court here should have considered the merits of defendant's MAR.

2. Constitutional Law—effective assistance of counsel—appellate—omission of argument

The trial court in a drug trafficking case erred by denying defendant's motion for appropriate relief (MAR) alleging ineffective assistance of appellate counsel. In defendant's appeal from the trial court's denial of his motion to suppress, his attorney's performance was deficient in failing to challenge the trial court's findings regarding police detectives' knowledge of his vehicle's inspection status, as evidenced by the attorney's subsequent affidavit stating that the omission was not a strategic one and that she knew she could not use a reply brief to make new arguments on appeal. The attorney's error was prejudicial because the inspection violation was not supported by competent evidence and thus could not support the traffic stop's validity; further, the other two bases of the traffic stop could not pass constitutional muster.

Appeal by defendant from order entered 29 August 2017 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

N.C. Prisoner Legal Services, Inc., by Laura E. A. Altman and Reid Cater, for defendant-appellant.

ZACHARY, Judge.

Defendant Gregory Charles Baskins appeals from the trial court's order denying his Motion for Appropriate Relief. We reverse.

Background

Defendant was charged with conspiracy to traffic in heroin, trafficking by possession of 28 grams or more of heroin, and trafficking by transportation of 28 grams or more of heroin. Defendant filed a Motion to Suppress the evidence on the grounds that the initial seizure that resulted in the inculpatory search was unlawful. The trial court denied Defendant's Motion to Suppress, which this Court affirmed in *State v. Baskins*, No. COA15-1137, 2016 N.C. App. LEXIS 465 ("*Baskins I*"). Defendant thereafter filed a Motion for Appropriate Relief arguing that he received ineffective assistance of appellate counsel in *Baskins I*. The trial court denied Defendant's Motion for Appropriate Relief. Defendant appeals.

I. The Seizure

The evidence presented at the hearing on Defendant's Motion to Suppress tended to show that, on 6 October 2014, Defendant and his traveling companion Tomekia Bone arrived in Greensboro from New York at 6:30 a.m. on the China Bus. At the time of Defendant's arrival, Detective M.R. McPhatter of the Greensboro Police Department was conducting surveillance of the China Bus stop as part of an interdiction team. Detective McPhatter was surveilling the China Bus stop because he "was aware the China Bus was a known method for individuals to transport narcotics because, among other reasons, there was little screening of passengers or their baggage."

Detective McPhatter observed Defendant and Ms. Bone exit the China Bus carrying small bags. According to Detective McPhatter, he "was aware that individuals who transport narcotics often travel on short, up and back trips to New York and, therefore, travel with only small bags."

While Detective McPhatter watched, Defendant and Ms. Bone went inside the Shell station where Detective McPhatter was parked in an unmarked vehicle. Defendant exited the Shell station after a few minutes and looked toward Detective McPhatter's vehicle. "Defendant then gestured at the vehicle as if to [wave] it off and walked back to the door of the Shell station." Detective McPhatter was not sure whether Defendant was trying to determine whether the unmarked vehicle was his ride, or

whether Defendant was trying to determine if a police officer was inside the car. Detective McPhatter radioed the other officers on the interdiction team concerning the occurrence. Shortly thereafter, a Buick pulled into the Shell station and picked up Defendant and Ms. Bone.

Detective McPhatter testified that he ran the Buick's registration on the laptop in his vehicle and learned that the Buick had an expired registration and an inspection violation. However, Detective McPhatter feared that his identity may have been compromised, so he relayed that information to the other detectives and asked them to follow the Buick.

Detective M.P. O'Hal began following the Buick. Detective O'Hal also ran the Buick's tag information and testified that he learned the Buick had an expired registration and an inspection violation. Detective O'Hal testified that at that point he made the decision to stop the Buick. Detective O'Hal approached the vehicle and began conversing with the driver. During that time, Detective O'Hal noticed that Defendant and Ms. Bone appeared very anxious and were sweating heavily.

Detective O'Hal asked the driver for his permission to search the vehicle. The driver consented and the detectives discovered heroin.

II. Motion to Suppress

At the hearing on Defendant's Motion to Suppress, the focus was on the validity of the initial stop of the Buick. At issue was the fact that when the State introduced the DMV information upon which the detectives relied when making the decision to stop the Buick, the DMV information revealed that the Buick's registration was still valid. While technically expired, the DMV printout indicated that the registration was still valid through 15 October 2014:

> PLT STATUS: EXPIRED
>
> ISSUE DT: 09262013 VALID THROUGH 10152014

Indeed, the driver was operating the Buick during the fifteen-day grace period within which the vehicle could be lawfully operated pursuant to N.C. Gen. Stat. § 20-66.1. Detective O'Hal testified that he knew there was a fifteen-day grace period following expiration of a vehicle's registration during which the expired registration remained valid. However, Detective O'Hal explained that he stopped reading the DMV printout when he read that the registration was expired, and therefore he did not learn that it was still valid.

Further, while Detective O'Hal testified that he had also stopped the Buick for an inspection violation, the DMV printout contained no information concerning the status of the Buick's inspection.

Nevertheless, in its order denying Defendant's Motion to Suppress, the trial court found that the detectives "ran the license tag information for the Red Buick . . . and . . . determined that the car had an expired registration and an inspection violation[,]" and that "[t]he stop was initiated because of the expired registration and the inspection violation." The trial court then denied Defendant's Motion to Suppress based upon the following pertinent conclusions of law:

> 1. The . . . registration on the Buick had expired at the time of the stop. North Carolina General Statutes gives officers the authority to issue a citation where probabl[e] cause exists to believe there has been a violation of Chapt. 20 of the General Statutes. N.C.G.S. § 15A-302. Where probable cause exists that a Chapt. 20 violation exists, an officer may stop the vehicle to issue a violation or a warning.
>
> 2. The officers had probabl[e] cause to stop the Buick based on the information received from the DMV search that the vehicle's registration had expired and that an inspection violation had occurred. If the officers were mistaken as to whether or not a Chapt. 20 violation existed at the time of the stop, such was a reasonable mistake of law that did not render the stop invalid. *Heien v. North Carolina*, ___ U.S. ___, 135 S. Ct. 530 (2014).
>
> 3. Considering the totality of the circumstances, Det. O'Hal had reasonable suspicion that criminal activity related to narcotics was afoot when he stopped the Buick, based on the information received from Det. Mc[Ph]atter and his own experience with the circumstances[.]"

Defendant thereafter entered an *Alford* plea[1] to all charges but preserved his right to appeal the denial of his Motion to Suppress.

III. *Baskins I*

While the trial court concluded that the initial seizure of the Buick was justified based on (1) the Buick's inspection violation, (2) the

1. Named after *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), a defendant is said to have entered an *Alford* plea when the defendant pleads guilty without an admission of guilt

Buick's expired registration, and (3) Detective O'Hal's "reasonable suspicion that criminal activity related to narcotics was afoot[,]" Defendant's counsel on appeal in *Baskins I* challenged only the latter two justifications. Appellate counsel did not challenge any of the trial court's findings of fact. In particular, appellate counsel did not challenge the trial court's findings of fact that the detectives learned of the inspection violation when they ran the Buick's tag information. Thus, despite Defendant's arguments challenging the lack of reasonable suspicion and the reasonableness of the mistake concerning the Buick's registration status, this Court concluded that, "[b]ecause Defendant did not challenge the trial court's findings of fact, we must disagree." *Baskins I*, 2016 N.C. App. LEXIS 465, at *7. We explained:

> As the State correctly points out, Defendant "does not challenge the trial court's findings as to the inspection violation." In fact, Defendant does not specifically challenge any of the trial court's findings of fact, and Defendant does not address the alleged inspection violation in his brief to this Court. In response to the State's brief, Defendant filed a reply brief in which he argues that there was no evidence presented at the suppression hearing indicating that Detective O'Hal could have known the inspection was expired. Though Defendant's argument in his reply brief might have merit, Defendant cannot use a reply brief to introduce new arguments on appeal. *State v. Dinan*, 233 N.C. App. 694, 698, 757 S.E.2d 481, 485, *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014) (citation omitted) ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief. *See* N.C.R. App. P. 28(b)(6)[.]"). Further, even in his reply brief, Defendant failed to challenge the following findings of fact:
>
> > 5. Det. McPhatter ran the registration for the . . . Buick on the laptop in his vehicle and learned that the Buick had an expired registration and an inspection violation. He communicated this information to other, assisting detectives and, because he was concerned that his identity had been compromised, he asked other detectives to follow the . . . Buick so he could stay back a distance.
> >
> > . . .

> 8. Det. O'Hal also ran the license tag information for the . . . Buick relayed by Det. McPhatter and also determined that the [Buick] had an expired registration and an inspection violation.
>
> . . .
>
> 10. The stop was initiated because of the expired registration and the inspection violation.
>
> Because Defendant does not challenge these findings of fact, they are binding on appeal. *White*, 232 N.C. App. at 301, 753 S.E.2d at 701.
>
> Driving a vehicle without the required up-to-date inspection is an infraction in North Carolina. N.C. Gen. Sat. § 20-183.8(a)(1) (2015). "A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation." N.C. Gen. Stat. § 15A-1113(b) (2015). Based upon the trial court's unchallenged findings of fact, Detective O'Hal determined that the Buick was being operated with an expired inspection, and Detective O'Hal initiated the stop of the Buick, in part, on that basis. These findings of fact are sufficient to support the trial court's conclusion that Detective O'Hal "had [probable] cause to stop the Buick based on the information received from the DMV search that an inspection violation had occurred." This argument is without merit.

Baskins I, 2016 N.C. App. LEXIS 465, at *7-10 (alterations omitted) (footnote omitted). Accordingly, without having to address Defendant's subsequent arguments, this Court affirmed "the denial of Defendant's motion to suppress based solely upon the trial court's [unchallenged] determination that an inspection violation justified the initial stop of the Buick." *Id.* at *10.

IV. Motion for Appropriate Relief

According to Defendant, "[t]here was no evidence to support the finding of fact that the officer was aware of an inspection violation at the time of the stop." Defendant therefore filed a Motion for Appropriate Relief with the trial court on 5 June 2017 in which he alleged that he "received ineffective assistance of counsel" in *Baskins I* "when appellate counsel failed to challenge the trial court's findings of fact in its

order denying his Motion to Suppress." In support of this contention, Defendant noted that appellate counsel *did* challenge the findings of fact concerning the inspection violation in her reply brief "upon reading the State's response brief, which relied on the inspection violation as the basis for the stop." Defendant also attached as an exhibit the affidavit of appellate counsel in which she averred that

> I did not make a strategic decision not to challenge the findings of fact related to the DMV printout in the appellate brief. I did not raise this issue because I did not notice it when I reviewed the record. If I had noticed this issue before filing the brief, I would have raised it at the appropriate time.

Defendant argued that had his appellate counsel "properly challenged the trial court's findings of fact," this Court "would have reversed the trial court's denial of the motion [to suppress] and vacated [Defendant's] convictions because the officer did not have a reasonable suspicion for the traffic stop." Accordingly, based on the facts already in the record, Defendant asked the trial court to adjudicate his Motion for Appropriate Relief for ineffective assistance of counsel "on the merits of the pleadings" and attachments, or in the alternative, to "order the State to file a response and schedule a hearing for the purpose of taking evidence and hearing the arguments of counsel[.]"

The trial court concluded by order entered 29 August 2017 that Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of counsel could "be resolved without an evidentiary hearing" and that it "present[ed] only legal issues[.]" The trial court determined that Defendant's Motion for Appropriate Relief ultimately asked the trial court to "reverse the order denying the Defendant's Motion to Suppress . . . and vacate Defendant's convictions." To that point, the trial court cited "the well established rule in North Carolina . . . that one Superior Court judge . . . may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (alteration omitted) (citation omitted). The trial court regarded Defendant's Motion for Appropriate Relief as "asking th[e] Court . . . to overrule another Superior Court judge," and therefore concluded that Defendant's Motion for Appropriate Relief for ineffective assistance of appellate counsel was "meritless and should be denied."

Defendant filed a Petition for Writ of Certiorari asking this Court to review the trial court's order denying his Motion for Appropriate Relief.

This Court allowed Defendant's Petition for Writ of Certiorari by order entered 9 October 2017.

Discussion

Defendant argues (1) that the trial court erred in denying his Motion for Appropriate Relief based on the incorrect conclusion that it did not have the authority to do otherwise, and (2) that the trial court erred in denying his Motion for Appropriate Relief because Defendant made a proper showing of ineffective assistance of appellate counsel. We agree.

I. Ineffective Assistance of Appellate Counsel

The right to counsel guaranteed by Article I, Section 23 of the North Carolina Constitution and the Sixth Amendment to the United States Constitution "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). The Fourteenth Amendment further requires that defendants be afforded effective assistance of *appellate* counsel. *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 830 (1985); *Smith v. Robbins*, 528 U.S. 259, 279, 145 L. Ed. 2d 756, 776 (2000).

The burden is on the defendant to demonstrate that he received ineffective assistance of counsel "so . . . as to require reversal of [the defendant's] conviction[.]" *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). In order to satisfy that burden, the defendant must establish both of the elements of a claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (emphasis omitted); *accord Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (adopting the test laid out in *Strickland*). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The same standard applies to claims of ineffective assistance of appellate counsel.

State v. Simpson, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275, *disc. review denied*, 360 N.C. 653, 637 S.E.2d 191 (2006) (citing *Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780).

II. Superior Court Judge's Authority on a Motion for Appropriate Relief

[1] In his Motion for Appropriate Relief, Defendant argued that his

> appellate counsel fell below an objective standard of professional reasonableness by failing to challenge the trial court's findings of fact in its order denying the motion to suppress, which resulted from her failure to identify the issue in her review of the record. [Defendant] was prejudiced by this error. There was no competent evidence that the officers had reasonable suspicion to believe that a traffic law was being broken at the time of the stop. If appellate counsel had raised this issue by challenging the findings of fact in [Defendant's] case the Court of Appeals would have reversed the order denying the Motion to Suppress and vacated [Defendant's] convictions.

Nevertheless, the trial court denied Defendant's Motion for Appropriate Relief on the grounds that the ineffective assistance of counsel analysis would require the trial court to overrule the earlier superior court judge's order denying Defendant's Motion to Suppress. The trial court concluded that because it did not have the authority to do so, Defendant's Motion for Appropriate Relief must be denied.

The rule that "one superior court judge may not reconsider an order entered by another superior court judge," *State v. Woolridge*, 357 N.C. 544, 545, 592 S.E.2d 191, 191 (2003), is premised upon the fact that "[t]he power of one judge of the superior court is equal to and coordinate with that of another[.]" *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). "[I]t is well established in our jurisprudence that . . . ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194 (citation and quotation marks omitted). However, this rule is generally inapplicable where a judge is tasked with deciding the merits of a defendant's motion for appropriate relief.

Pursuant to N.C. Gen. Stat. § 15A-1415(a) and (b), a defendant may file a motion for appropriate relief at any time after the verdict on the grounds that "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina."

N.C. Gen. Stat. § 15A-1415(b)(3) (2017). Because effective assistance of appellate counsel is guaranteed by the Due Process Clause of the Constitution, *Evitts*, 469 U.S. at 396, 83 L. Ed. 2d at 830, a defendant may "allege[] ineffective assistance of . . . appellate counsel as a ground for the illegality of his conviction" under N.C. Gen. Stat. § 15A-1415(b)(3). N.C. Gen. Stat. § 15A-1415(e) (2017). N.C. Gen. Stat. § 15A-1413 specifically provides that such motions are to be heard and determined by any superior court judge "empowered to act in criminal matters[.]" N.C. Gen. Stat. § 15A-1413(a) (2017). Our Supreme Court has likewise made clear that it is the duty of the trial judge—when faced with a motion for appropriate relief based on a claim of ineffective assistance of appellate counsel—to "fully address" whether the "defendant's appellate counsel's performance was deficient," and if so, "whether counsel's performance prejudiced [the] defendant." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Such a situation presents the superior court judge with the task of determining a new issue that has yet to be decided. *Cf. Va. Carolina Builders*, 307 N.C. at 567, 299 S.E.2d at 631.

As explained in subsection *ii* below, while the prejudice prong of an ineffective assistance of appellate counsel claim may implicate prior orders at the trial level, such implications are ancillary to the underlying claim of ineffective assistance of counsel. Indeed, N.C. Gen. Stat. § 15A-1415 explicitly authorizes such collateral action by a superior court judge. *E.g.*, N.C. Gen. Stat. § 15A-1415 (official commentary) ("The Motion for appropriate relief . . . is a device which may be used for any additional matters which relate to the original case[,]" such as "the question of whether or not . . . probation has been unlawfully revoked."). Not only are superior court judges statutorily authorized to do so, but superior court judges routinely perform such collateral reviews upon a defendant's motion for appropriate relief, with the sanction of our appellate courts. This is the case even though such a review may implicate an earlier superior court judge's actions or determinations. *See*, *e.g.*, *Vester v. Stephenson*, 465 F. Supp. 868, 870 (E.D.N.C. 1978) (allowing the petitioner to proceed with his claims, including ineffective assistance of counsel, noting that, among other things, "collateral attacks [are] proper under Section 1415"); *State v. Spruiell*, ___ N.C. App. ___, ___, 798 S.E.2d 802, 806 (2017) ("In the MAR order, the trial court concluded that, under the factual circumstances of [the] [d]efendant's case, it was improper for the trial court to instruct the jury on felony murder."); *State v. Wilkerson*, 232 N.C. App. 482, 491, 753 S.E.2d 829, 836 (2014) ("[T]he trial court clearly had jurisdiction to reach the merits of [the] [d]efendant's challenge to Judge Gore's original judgments pursuant to N.C. Gen. Stat. § 15A-1415(b)(4) and (b)(8)."); *Edmondson v. State*,

33 N.C. App. 746, 749, 236 S.E.2d 397, 399 (1977), *overruled on other grounds*, *State v. Dickens*, 299 N.C. 76, 84, 261 S.E.2d 183, 188 (1980) (answering in the negative the question of "whether an adjudication by a trial judge that a plea of guilty is voluntarily made bars a criminal defendant from collaterally attacking that plea in a post conviction hearing").

Accordingly, the superior court judge in the instant case acted under a misapprehension of the law when he denied Defendant's Motion for Appropriate Relief on the grounds that it would impermissibly require him to "overrule another Superior Court judge[.]"

III. Merits of Defendant's Motion for Appropriate Relief

[2] The State argues that "[e]ven assuming the trial court erred in its rationale, it did not err by ultimately denying Defendant's MAR" because "Defendant failed to show ineffective assistance of appellate counsel." On the other hand, Defendant argues that he made a proper showing of ineffective assistance of appellate counsel, and that the trial court was required to grant his Motion for Appropriate Relief. Thus, Defendant maintains that the "MAR court's order must be reversed[,]" and that "[t]his Court should vacate [his] convictions since he was denied effective assistance of appellate counsel." We agree with Defendant.

In the instant case, Defendant properly asserted his claim of ineffective assistance of appellate counsel through a motion for appropriate relief in the trial court. *See State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002) ("In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal."). The order denying Defendant's Motion for Appropriate Relief is devoid of findings relating to any deficiency in appellate counsel's performance, possibly as a result of the trial court's conclusion that it could not overrule the prior judge. Nevertheless, it is appropriate for an appellate court to reach the merits of a claim of ineffective assistance of appellate counsel on direct review "when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citing *State v. Blakeney*, 352 N.C. 287, 308-09, 531 S.E.2d 799, 815-16 (2000) and *State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995)).

Here, we agree with the trial court that Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of counsel "may be resolved without an evidentiary hearing." For the reasons

explained below, we are able to "discern from the record before us whether" appellate counsel's performance was deficient in *Baskins I* and whether Defendant was prejudiced thereby. *State v. Edgar*, 242 N.C. App. 624, 632, 777 S.E.2d 766, 771 (2015). We therefore proceed to the parties' arguments on the merits of Defendant's ineffective assistance of counsel claim.[2]

i. *Deficient Performance*

In order to establish the first prong of an ineffective assistance of counsel claim, the defendant must show "that his counsel's conduct fell below an objective standard of reasonableness." *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). In the appellate context, a claim of ineffective assistance of counsel requires a showing that the appellate representation did not fall "within the range of competence demanded of attorneys in [appellate] cases." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693 (citation and quotation marks omitted).

Generally, "the decision not to press [a] claim on appeal [is not] an error of such magnitude that it render[s] counsel's performance constitutionally deficient under the test of *Strickland*," *Smith v. Murray*, 477 U.S. 527, 535, 91 L. Ed. 2d 434, 445 (1986) (citation omitted), as there is a presumption that "the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 695 (citation and quotation marks omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.* at 690, 80 L. Ed. 2d at 695. Nevertheless, a defendant may be able to overcome this presumption of sound trial strategy and successfully establish "that his counsel was objectively unreasonable in failing to find arguable issues[.]" *Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780 (internal citation omitted); *see Strickland*, 466 U.S. at 690-91, 80 L. Ed. 2d at 695 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

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2. We also note the particular appropriateness of an appellate court ruling on the merits of an ineffective assistance of appellate counsel claim, as that inquiry now necessitates an analysis of whether there is a reasonable probability that the defendant ultimately " 'would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue.' " *Spruiell*, ___ N.C. App. at ___, 798 S.E.2d at 805 (quoting *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015)).

Here, Defendant argues that his appellate counsel's performance in *Baskins I* was deficient in failing to challenge the trial court's findings of fact regarding the detectives' knowledge of the Buick's inspection status at the time of the initial stop. The State argues that "[s]ince the trial court's findings *were* supported by competent evidence, appellate counsel did not render deficient performance by failing to challenge the findings." (emphasis added).

Contrary to the State's position, the record before this Court reveals that appellate counsel's failure to challenge the trial court's findings of fact regarding the inspection violation was not a reasonable strategic decision based on the argument's lack of merit. *Todd*, 369 N.C. at 712, 799 S.E.2d at 838. As the trial court denied Defendant's Motion to Suppress on the basis that the initial stop of the Buick was justified on three independent grounds, appellate counsel was tasked with reviewing the sufficiency—both legal and evidentiary—for each of those grounds. *See Murray*, 477 U.S. at 536, 91 L. Ed. 2d at 445. However, appellate counsel apparently realized that she had failed to do so upon reading the State's brief, wherein the State noted the inspection violation as an additional justification for the stop. Appellate counsel thereafter submitted a reply brief in which she, for the first time, challenged the evidentiary support for the trial court's findings of fact concerning the inspection violation. That appellate counsel subsequently raised the argument in her reply brief demonstrates that the initial omission was an oversight rather than a reasoned judgment. Moreover, while not controlling, appellate counsel's subjective explanation is relevant to the determination of whether her performance was objectively deficient. On record before us is an affidavit submitted by appellate counsel in *Baskins I*, which directly contradicts the State's position that appellate counsel made a strategic decision not to challenge the trial court's findings of fact. The affidavit provides that "[a]fter reviewing the State's response to my brief, which relied on the inspection status as the basis for the stop, I realized that I had missed this issue in my initial review of the record." The affidavit further provides that "I knew from my training and experience as an appellate attorney that a reply brief cannot be used to make new arguments on appeal."

Accordingly, the record sufficiently demonstrates that appellate counsel did not make a "reasonable professional judgment[]" when she neglected to challenge the trial court's findings of fact concerning the inspection status. *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 695. Defendant has thus satisfied the first prong of his ineffective assistance of counsel claim.

ii. *Prejudice*

Nonetheless, as our Supreme Court has explained, "[t]he fact that counsel made an error, or even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). In other words, a defendant must not only demonstrate that his counsel's performance was deficient, but also that he was prejudiced thereby. *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696. " 'To show prejudice in the context of appellate representation, a [defendant] must establish a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue.' " *Spruiell*, ___ N.C. App. at ___, 798 S.E.2d at 805 (quoting *Rangel*, 781 F.3d at 745 (internal quotation marks omitted)). "[F]or purposes of establishing prejudice, a 'reasonable probability' . . . simply means 'a probability sufficient to undermine confidence in the outcome' of the appeal." *State v. Collington*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 N.C. App. LEXIS 397, at *29 (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

In the instant case, Defendant argues that he has set out a proper showing of prejudice because "[i]f appellate counsel had argued that the findings of fact were not supported by competent evidence, [this Court] would have reversed the denial of the Motion to Suppress and vacated his convictions." On the other hand, the State argues that even "[h]ad appellate counsel challenged the findings regarding the [vehicle's] inspection status" in *Baskins I*, "this Court would have been bound to reject the argument because Detective O'Hal's testimony supported the findings." Moreover, the State argues that Defendant was not prejudiced by appellate counsel's failure to challenge the trial court's findings of fact because the trial court's ultimate "conclusion—upholding the traffic stop—was legally correct."

We address each of the trial court's three justifications for the stop of the Buick in turn as they become relevant to the prejudice analysis.

1. Inspection Violation

When reviewing a trial court's order granting or denying a motion to suppress, this Court "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact will be binding on an appellate court so long as they are supported by competent evidence. *Id.*

In the present case, had appellate counsel in *Baskins I* challenged the trial court's relevant findings of fact, there is a reasonable probability that this Court would have concluded that the trial court's finding that "[t]he stop was initiated because of . . . the inspection violation" was not supported by competent evidence and thus could not support the trial court's conclusion of the stop's validity.

The State's Exhibit 1 was a printout of the DMV request for the Buick, which the detective testified was "the same information that [was] available to [him] when [he] ran the plate" on the Buick. However, the DMV printout contained no information concerning the Buick's inspection status, and the detectives did not claim any other source for their alleged knowledge of the Buick's inspection violation. In light of the actual DMV information that was presented, the detectives could not have known that the Buick's inspection was expired at the time Detective O'Hal decided to stop the Buick. Moreover, even if the trial court had noted the discrepancy between the detectives' testimony and the DMV information presented, the trial court concluded as a matter of law that "[t]he officers had probabl[e] cause to stop the [vehicle] based on the information received *from the DMV search* . . . that an inspection violation had occurred." (emphasis added). Because the DMV information presented at the hearing contained no information concerning an inspection violation, we agree with Defendant that there exists a reasonable probability that this Court would have found the findings regarding the inspection to be unsupported by competent evidence had appellate counsel challenged them in *Baskins I*. *See*, *e.g.*, *State v. Fisher*, 141 N.C. App. 448, 454, 539 S.E.2d 677, 682 (2000) ("We recognize that contradictions and inconsistencies rarely render a court's factual findings erroneous. However, the testimony presented at the suppression hearing . . . contained material inconsistencies in the State's own evidence, not simply contradictions between the State's evidence and defendant's evidence.").

Given the reasonable probability that the inspection status would not have been found to support the validity of the stop in *Baskins I*, this Court would have next proceeded to an examination of Defendant's arguments pertaining to the two additional grounds upon which the trial court based its denial of Defendant's Motion to Supress. *See Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984).

2. Reasonable Mistake of Fact

On appeal from the trial court's denial of Defendant's Motion to Suppress in *Baskins I*, appellate counsel argued that "the trial court erred

in ruling that police lawfully stopped the car in which [Defendant] was riding because a mistaken belief of fact that a traffic violation occurred is objectively unreasonable and cannot justify a warrantless seizure." We conclude that there is a reasonable probability this Court would have agreed with this argument had it been addressed in *Baskins I*.

"[T]o conduct an investigatory warrantless stop and detention of an individual, a police officer must have reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity." *State v. Hudgins*, 195 N.C. App. 430, 433, 672 S.E.2d 717, 719 (2009) (citation omitted). "[T]he reasonable suspicion standard requires that the stop be based on specific and articulable facts . . . as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (alteration omitted) (citation and quotation marks omitted). Indeed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley v. California*, ___ U.S. ___, ___, 189 L. Ed. 2d 430, 439 (2014) (citation omitted). Nevertheless, "[t]o be reasonable is not to be perfect[.]" *Heien v. North Carolina*, ___ U.S. ___, ___, 190 L. Ed. 2d 475, 482 (2014). The Fourth Amendment therefore "allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' " *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176, 93 L. Ed. 1879, 1891 (1949)). That some leeway is provided, however, does not afford law enforcement officials the unfettered liberty to be inaccurate. "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or law—must be *objectively* reasonable." *Id.* at ___, 190 L. Ed. 2d at 486.

Here, the detectives contended that they also stopped the Buick for having an expired registration even though the registration was, in fact, still valid. Nevertheless, the trial court concluded that even "[i]f the officers were mistaken as to whether or not a Chapt. 20 violation existed at the time of the stop, such was a reasonable mistake of law that did not render the stop invalid" under the Fourth Amendment. Our duty in the instant case is simply to determine whether there is a reasonable probability that this Court would have disagreed with this conclusion of law had it been addressed in *Baskins I*.

Initially, we note that the case at bar does not involve a mistake of law. The detective testified that he was aware that the North Carolina statute provides a fifteen-day grace period following the date of a vehicle's registration expiration during which the vehicle may be lawfully operated, and that "to the best of [his] knowledge," "it was in fact lawful for [Defendant's] vehicle to be operated" on the date of the stop. N.C.

Gen. Stat. § 20-66(g) (2017). The detective's belief that the Buick was being operated without a valid registration was thus a mistake of fact rather than of law.

In addition, not only did the detective testify that he knew there was a fifteen-day grace period following expiration of a vehicle's registration, but the DMV information upon which the detective relied at the time of the stop explicitly provided that the Buick's registration was "VALID THRU: 10152014." Nevertheless, the detective testified that his oversight regarding the vehicle's lawful status was due to the fact that "We're not going to scroll down to check a date being valid or not valid." That the detectives stopped the Buick for a registration violation despite having intentionally neglected to read the very sentence in which the relevant expiration date appeared renders questionable the reasonableness of any resultant mistake that ensued. *See State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) ("This Court requires that the stop be based on specific and articulable facts . . . as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.") (alterations omitted) (citation and quotation marks omitted). This is also not a case in which the factual assessment regarding the Buick's registration status was required to be made "on the fly." *Heien*, ___ U.S. at ___, 190 L. Ed. 2d at 486. Rather, the detective accessed the DMV information while he was following the Buick as it was obeying the speed limit, at 7:00 a.m., in an area with "not a lot of vehicles on the road," and with the active assistance of at least four additional officers.

Thus, in the present case the detectives had an admittedly accurate understanding of the law, which was coupled with information that was readily available to them indicating that the Buick's registration was still valid. Under these circumstances, we conclude that there is a reasonable probability that this Court would have determined that the facts do not constitute the sort of objectively reasonable mistake of fact tolerable under the Fourth Amendment, and therefore these facts could not serve as a justification for the stop.

3. Reasonable Suspicion

Finally, had appellate counsel challenged the trial court's findings of fact in *Baskins I*, this Court would have been required to address Defendant's argument that "the trial court erred in concluding that reasonable suspicion existed to stop the car in which [Defendant] was a passenger . . . to conduct a narcotics investigation when police lacked individualized reasonable suspicion and acted on the same hunch they applied to everyone who arrived in Greensboro on the China Bus." We

conclude that there is a reasonable probability that this Court would have found this argument meritorious in *Baskins I*.

As explained *supra*, "[a]n investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). Whether an officer had a reasonable suspicion to stop a vehicle for investigatory purposes must be considered in light of the totality of the circumstances. *Id.* (citation omitted). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968), and *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979)). The justification must be objective rather than subjective. *Id.* at 442, 446 S.E.2d at 70 (citing *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). The officer "must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch.' " *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10 (citation and quotation marks omitted).

Here, we note that the trial court's findings of fact in its denial of Defendant's Motion to Suppress provided only that "[t]he stop was initiated because of the expired registration and the inspection violation." Moreover, the conclusion that the detectives "had reasonable suspicion that criminal activity related to narcotics was afoot" was based solely on the facts (1) that the detectives observed Defendant and Ms. Bone exit the China Bus carrying small bags at the "same bus stop that a lot of heroin is being transported from New York to the Greensboro area[;]" and (2) that while waiting for his ride at the adjacent gas station, Defendant briefly looked toward Detective McPhatter's unmarked vehicle and "shooed [his vehicle] off[,]" at which point Defendant's ride—the Buick—pulled into the parking lot.

The facts of this case bear a marked likeness to those presented in the United States Supreme Court case *Reid v. Georgia*, in which

> [t]he appellate court's conclusion . . . that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drug courier profile," a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically, the court thought it relevant that (1) the petitioner had arrived from

> Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived early in the morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

448 U.S. 438, 440-41, 65 L. Ed. 2d 890, 894 (1980). From these facts, the Supreme Court concluded

> that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id. at 441, 65 L. Ed. 2d at 894.

In the instant case, the detectives' inference of criminal activity from Defendant waving off Detective McPhatter's unmarked vehicle at the gas station "was more an inchoate and unparticularized suspicion or 'hunch,' than a fair inference in the light of [their] experience[.]" *Id.* And, even when viewed through the officers' experience that "persons that get on this bus line could possibly be trafficking in narcotics[,]" the fact that an individual—entirely unknown to officers—is seen carrying "just some small, little luggage bags" while returning on the China Bus from a weekend trip to New York is far "too slender a reed to support the seizure in this case." *Id.*

Accordingly, had appellate counsel challenged the findings of fact in *Baskins I*, we conclude that there is a reasonable probability that this Court would have determined that the trial court also erred in denying Defendant's Motion to Suppress on the grounds that the detective "had reasonable suspicion that criminal activity related to narcotics was afoot when he stopped the Buick."

***

Despite the trial court's reluctance to reach the merits of Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of appellate counsel, we are able to conclude from the cold record developed on appeal that the trial court erred in denying Defendant's Motion for Appropriate Relief. Had appellate counsel challenged the trial court's findings of fact regarding the Buick's inspection status in its order denying Defendant's Motion to Suppress, there is a reasonable probability that this Court would have concluded that those findings of fact were not supported by competent evidence. This Court would have then proceeded to the two arguments that Defendant did raise in *Baskins I*. Given the merit of those two arguments, we conclude that there is a reasonable probability that had appellate counsel challenged the trial court's findings of fact concerning the inspection violation, Defendant would have been successful in his appeal in *Baskins I*. Accordingly, the trial court erred when it denied Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of appellate counsel.

Conclusion

For the reasons explained herein, the trial court's order denying Defendant's Motion for Appropriate Relief is reversed and this matter is remanded for entry of an order granting Defendant's Motion for Appropriate Relief and vacating his convictions.

REVERSED AND REMANDED FOR NEW TRIAL.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
DUVAL LAMONT BOWMAN, DEFENDANT

No. COA17-657

Filed 7 August 2018

1. Constitutional Law—Confrontation Clause—cross-examination of witness—pending unrelated charges

In a prosecution for first-degree murder and related crimes, the trial court erred in limiting defendant's cross-examination of the State's principal witness regarding possible bias where the witness had pending drug charges in another county and defendant produced evidence of an email exchange between prosecutors which he argued established a possible reduction of those charges in exchange for her testimony against him.

2. Constitutional Law—Confrontation Clause—error in limiting cross-examination—prejudice

The trial court's constitutional error in prohibiting a defendant in a first-degree murder trial from cross-examining a witness about possible bias arising from her pending drug charges was prejudicial and required a new trial. The error was not harmless where the witness was the State's principal eyewitness and the State's other evidence against defendant was tenuous, making her testimony essential.

Judge DILLON dissenting.

Appeal by Defendant from Judgment and Commitment entered 27 July 2016 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Richard Croutharmel for Defendant-Appellant.

INMAN, Judge.

Duval Lamont Bowman ("Defendant") appeals from a final judgment and commitment following a jury verdict finding him guilty of first-degree murder, attempted armed robbery, and possession of a

firearm by a felon. Defendant argues that the trial court erred by: (1) failing to exclude statements he made during a police interrogation in which he was denied his constitutional right to an attorney; (2) violating Defendant's constitutional right to cross-examine the State's principal witness; (3) allowing the State to impeach its own witness with a subsequent witness; and (4) allowing a detective to testify as an expert without properly qualifying the detective as such. During the pendency of his appeal, Defendant filed a motion for appropriate relief with this Court arguing that his constitutional right to due process was violated because the State permitted its principal witness to falsely testify regarding whether she would benefit in exchange for her testimony against Defendant.

After careful consideration, we hold that the trial court committed a constitutional error in restricting Defendant's cross-examination of the State's principal witness and that the State has failed to show that the error was harmless beyond a reasonable doubt; therefore, we vacate the trial court's judgment and remand for a new trial. Defendant's motion for appropriate relief is dismissed as moot.

Factual and Procedural History

The State's evidence at trial tended to show the following:

In the early morning of 23 February 2014, Defendant borrowed a friend's vehicle and went to the home of Lakenda Malachi and her fiancé Anthony Johnson. Defendant, Malachi, and Johnson were all associates in the drug business.

When Defendant arrived at Malachi's house, he confronted Johnson about money Johnson allegedly owed Defendant. Malachi testified that she witnessed Defendant pointing two guns at Johnson, at which point Defendant said: "Y'all did me dirty." As Malachi ran to the next room she heard shots being fired. Defendant then demanded that Malachi give up the money. She locked herself in the other room. Defendant kicked the door open and Malachi told him that she would find the money.

As Malachi began looking for the money, Defendant started hitting her with the guns and told her that he was going to kill Johnson. Malachi ran outside and hid in the bushes. She reached a neighbor's door and was able to make two phone calls: the first was to a male friend named "Royal Highness Salley," and the second was to another male friend named Kasim Washington. After Malachi made her phone calls, the neighbor called 9-1-1.

Approximately ten minutes later, police arrived at the neighbor's house to find Malachi crying and mumbling. Police found Johnson in Malachi's house lying face down in the living room without a pulse. EMS pronounced Johnson dead at the scene. He had been shot twice in the back and once in the left leg and died as a result of the wounds to his back.

Defendant was apprehended in New York by United States Marshals and returned to North Carolina. On 28 March 2014, Detectives interviewed Defendant. Defendant denied any involvement in Johnson's death. Defendant was indicted on 4 May 2015 for murder and on 4 January 2016 for possession of a firearm by a felon. On 6 June 2016, a superseding indictment was filed for first-degree murder along with an indictment for attempted robbery with a dangerous weapon.

Defendant's case went to trial in July 2016. The State presented no physical evidence linking Defendant to the shooting but argued that Malachi's eyewitness testimony established his guilt. On 27 July 2016, the jury found Defendant guilty on all charges and the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant appealed in open court.

Analysis

[1] We address only one of Defendant's arguments on appeal, which we hold entitles him to a new trial. Defendant contends that the trial court erred by limiting the scope of his cross-examination of Malachi, preventing him from adequately questioning her regarding pending drug charges in Guilford County for which she could receive a favorable plea offer contingent on her testimony against Defendant. After careful review of the record and applicable law, we agree.

"Under the Confrontation Clause of the Sixth Amendment to the United States Constitution, an accused is guaranteed the right to be confronted with his adverse witnesses." *State v. Ward*, 354 N.C. 231, 260, 555 S.E.2d 251, 269 (2001) (citing *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 498 (1999)). "This right, however, is not without limits, and the trial court 'retain[s] broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness.' " *Id.* at 260, 555 S.E.2d at 270 (quoting *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986)).

It is well established that pending criminal charges or any criminal convictions for which a witness is currently on probation are generally permissible topics for cross-examination because "the jury is entitled to

consider, in evaluating a witness's credibility, the fact [that] the State has a 'weapon to control the witness.' " *State v. Ferguson*, 140 N.C. App. 699, 705, 538 S.E.2d 217, 222 (2000) (quoting *State v. Prevatte*, 346 N.C. 162, 164, 484 S.E.2d 377, 378 (1997)).

In *Prevatte*, the North Carolina Supreme Court held that the trial court committed a constitutional error by not allowing the defendant to ask certain questions during cross-examination of the State's principal witness. 346 N.C. at 163, 484 S.E.2d at 378. There, the jury found the defendant guilty of, among other things, first-degree murder. *Id.* at 164, 484 S.E.2d at 378. At the time of his testimony, the State's principal witness, an eyewitness to the shooting, "was under indictment in another county on nine charges of forgery and uttering forged checks." *Id.* at 163, 484 S.E.2d at 378. The Court noted that the other county in which the charges against the witness were pending "was under the same district attorney." *Id.* at 163, 484 S.E.2d at 378. Relying on the United States Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347 (1974), the North Carolina Supreme Court granted the defendant a new trial based on the trial court's failure to allow the defendant to question the State's primary witness about "whether [the witness] had been promised or expected anything in regard to the charges in exchange for his testimony in [the] case." *Id.* at 163, 484 S.E.2d at 378.

Similar limitations to cross-examination have been held not to be error when the pending charges were in a separate prosecutorial district from the district the witness was testifying in, and the defendant failed to present evidence of communication between the two prosecutorial districts. In *State v. Murrell*, 362 N.C. 375, 404, 665 S.E.2d 61, 80 (2008), the North Carolina Supreme Court distinguished *Prevatte* because the State's witness in *Murrell* was facing charges "in a different jurisdiction, and [the] defendant provide[d] no supporting documentation of any discussion between the two district attorneys' offices to demonstrate that [the witness's] testimony was biased in this respect." *Id.* at 404, 665 S.E.2d at 80. It follows that when considering whether a trial court has erred in limiting cross-examination about pending charges against a State's witness, the State's ability to use the pending charges to leverage the witness' testimony is essential.

Here, Defendant's trial counsel argued that an email exchange between prosecutors established a possible reduction of drug trafficking charges against Malachi in Guilford County in exchange for Malachi's testimony against Defendant in Forsyth County. Following a *voir dire* exchange, the trial court ruled that it would allow defense counsel limited cross-examination of Malachi regarding her pending charges.

However, before the jury, the trial court limited defense counsel's questioning as follows:

> DEFENSE COUNSEL: Isn't it true on that date, you were charged by the High Point Police Department with one count of trafficking in methamphetamine, one count conspiracy to traffic in methamphetamine, one count of trafficking in marijuana and one count of conspiracy to traffic in marijuana?
>
> MALACHI: And what day—what date did you say?
>
> DEFENSE COUNSEL: January 21st of 2015.
>
> MALACHI: Yes, sir.
>
> DEFENSE COUNSEL: And those charges are still pending, are they not?
>
> MALACHI: Yes, sir.
>
> . . .
>
> DEFENSE COUNSEL: And this is in Guilford County?
>
> MALACHI: Yes, sir.
>
> . . .
>
> DEFENSE COUNSEL: What, if anything, have you been offered from the State at this point regarding those pending charges?
>
> MALACHI: I don't know nothing about that.
>
> DEFENSE COUNSEL: So nothing has been finalized in Guilford County?
>
> PROSECUTOR: Objection.
>
> THE COURT: Sustained.
>
> . . .
>
> DEFENSE COUNSEL: What, if anything, do you hope to gain out of testifying here for the State with regard to those five pending charges?
>
> MALACHI: Justice for Anthony Johnson.
>
> DEFENSE COUNSEL: So you don't think you're going to get anything out of it for the charges you got?

PROSECUTOR: Objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Are you aware of any other considerations you might have for those pending charges right now?

PROSECUTOR: Objection.

THE COURT: Sustained.

The sustained objections limited the testimony beyond that which the trial court ruled it would allow in *voir dire* and precluded Defendant's counsel from establishing a possible bias in Malachi's testimony against Defendant. The State argues that the trial court properly sustained the objections because defense counsel's questions sought to undermine Malachi's credibility based simply on the fact that she was charged with drug crimes. This argument is unpersuasive, particularly in light of the fact that Defendant, who also testified, admitted to having engaged in drug dealing. Because Defendant presented evidence of communication between the districts, the trial court's limitation of Malachi's cross-examination was in error.

[2] We must next determine whether the trial court's error requires a new trial. To avoid disturbing a jury verdict in a trial involving constitutional error, the State must prove that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443 (2017). In the context of a trial court unconstitutionally limiting a criminal defendant's right to cross-examine a witness about pending charges against the witness, the North Carolina Supreme Court has explained that such error may be harmless when the witness is "not a principal witness for the State but [is] a corroborating witness[,]" and has been impeached through other means. *State v. Hoffman*, 349 N.C. 167, 180, 505 S.E.2d 80, 88 (1998).

Similar to *Prevatte* and unlike in *Hoffman*, the witness Defendant sought to cross-examine here was the State's *principal* eyewitness. There were no other witnesses to the shooting of Johnson, and the other evidence provided by the State was tenuous, thereby making Malachi's testimony essential. The State argues that defense counsel's cross-examination was extensive, covering her timeline of events, the assault by Defendant, her phone calls from the neighbor's phone, and her inconsistent statements to medical providers, prosecutors, and police. However, the violation of the confrontation clause arises from Defendant's inability to question the witness specifically about the bias created by the pending charges—which the *Prevatte* court classified

as a "weapon to control the witness"—not from a generalized limited cross-examination. *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378. By not allowing defense counsel to inquire about Malachi's knowledge of plea negotiations or pending charges, Defendant was prevented from establishing a possible bias arising from the pending charges. The State has, therefore, failed to distinguish this case from *Prevatte* or demonstrate, as in *Hoffman*, that the error was harmless beyond a reasonable doubt. Accordingly, regardless of the extensiveness of the remaining permitted cross-examination of Malachi, the State here has failed to meet its burden of proving that the error was harmless.

Because Malachi was the State's principal and only eyewitness, there was evidence of communication between the two counties regarding Malachi's cooperation, and there was no physical evidence linking Defendant to the shooting, we conclude that the trial court erred in limiting defense counsel's cross-examination and that this error was not harmless beyond a reasonable doubt.

Conclusion

In light of the foregoing, we hold that the trial court erred by limiting defense counsel's cross-examination of Malachi and grant Defendant a new trial. We do not consider Defendant's other assignments of error, as the questions they pose may not recur at a new trial.

NEW TRIAL.

Judge STROUD concurs.

Judge DILLON dissents in separate opinion.

DILLON, Judge, dissenting.

I agree with the majority that the trial court should have allowed the State's sole principal eye-witness, on cross-examination, to answer whether she *thought* or *hoped* she would receive some leniency for the charges pending against *her* in return for her testimony against Defendant. A defendant is entitled for the jury to know that the State's principal witness might be biased, based on the possibility that the witness may be shown leniency by the prosecution regarding charges pending against the witness in exchange for the witness's testimony against the defendant.

I conclude, though, that *in the present case* any error by the trial court was harmless beyond a reasonable doubt. Though the trial court did not allow the witness to answer questions about her hope of receiving leniency, the trial court otherwise gave Defendant's counsel ample opportunity during cross-examination to get his point across to the jury. Specifically, Defendant's counsel was allowed to elicit testimony from the witness about the specifics of her pending drug charges. Also, the trial court allowed the witness to state that she did not "*know* anything about" whether the State would offer her leniency in exchange for her testimony. (Emphasis added.) The trial court simply did not allow the witness to state whether she "hoped" or "thought" she would receive leniency. Further, the witness testified that all she hoped to gain from testifying was "justice" for her boyfriend, who was the victim.

I have reviewed the Defendant's other arguments and do not believe that he has shown reversible error. Accordingly, my vote is that Defendant received a fair trial, free from reversible error.

STATE OF NORTH CAROLINA
v.
BRITTON DARRELL BUCHANAN

No. COA17-746

Filed 7 August 2018

1. Appeal and Error—preservation of issues—jury instructions—no objection

Defendant failed to preserve for appellate review an argument that the trial court deviated from the pattern jury instruction for the offense of assault by pointing a gun because he did not object to the jury instructions at trial and did not specifically allege plain error on appeal.

2. Assault—self-defense—evidence not exculpatory

In a prosecution for various assault charges pertaining to the use of a weapon in a physical altercation in a parking lot, defendant's motion to dismiss was properly denied where the evidence did not tend only to exculpate defendant. Defendant's own testimony, testimony from several witnesses, and video footage demonstrated defendant acting as the aggressor rather than in self-defense.

3. Sentencing—restitution—medical expenses—sufficiency of evidence

The trial court erred in ordering defendant to pay restitution for a victim's medical expenses incurred as a result of being assaulted, where the amount was not supported by sufficient testimony or documentary evidence.

Appeal by defendant from judgments entered 31 August 2016 by Judge Gale M. Adams in Lee County Superior Court. Heard in the Court of Appeals 4 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General LaShawn S. Piquant, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant.

ELMORE, Judge.

Defendant Britton Darrell Buchanan appeals from judgments entered upon jury verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and assault by pointing a gun. On appeal, defendant contends the trial court erred by omitting the essential element of "without legal justification" from its final mandate to the jury on the charge of assault by pointing a gun, by denying his motion to dismiss all the charges against him due to insufficient evidence to rebut his claim of self-defense, and by ordering restitution in an amount not supported by the evidence adduced at trial or sentencing. For the reasons stated herein, we dismiss in part, find no error in part, and vacate in part and remand.

Background

This appeal arises out of a physical altercation that took place in a Walmart parking lot on 20 March 2014.

Robert Noeth was picking up his aunt's prescription that afternoon when he encountered defendant inside the store. At the time, Robert's father James was living with defendant's ex-girlfriend, and Robert and defendant had a recent history of "trouble on the phone with text messages." While Robert was standing in the pharmacy line, defendant approached him from behind, poked him in the back, and stated, "you still running your mouth. I got something for you." Defendant then went outside to wait for Robert in the parking lot, while Robert used the pharmacist's phone to call his father.

Security cameras recorded what happened next, and several eyewitnesses testified at trial. Robert's aunt, Rhonda Yates, had been waiting in the parking lot while Robert went inside the store to pick up her prescription. Yates was sitting on Robert's truck tailgate with defendant—who had parked his vehicle next to Robert's—when James Noeth, Skylar Windham, and Andy Hicks arrived in a black SUV. Additionally, Fallon Hargenrader and her husband Jason had just finished shopping and were sitting in their car nearby, and Debbie Tulloch was walking through the parking lot toward defendant.

Robert was still inside the store when James, Windham, and Hicks arrived. James stopped the SUV directly in front of Yates and defendant, who immediately retrieved a gun from his vehicle. As the three men exited the SUV, defendant approached Windham first and pointed the gun directly in Windham's face, poking him in the eye. Defendant then moved on to James, who he pistol-whipped in the face before being intercepted by Hicks, who in turn hit defendant with a baseball bat.

A scuffle for the gun ensued after Hicks hit defendant with the bat. As the fighting slowed, defendant returned the gun to his vehicle and retrieved an axe handle instead. Defendant proceeded to knock James unconscious with the axe handle before swinging it repeatedly at Hicks and Robert, who by that time had come outside. Hicks and Windham eventually tackled defendant to the ground, and Robert kicked defendant to prevent him from getting up again. Defendant's jaw was broken in seven places and five of his teeth were knocked out during the altercation, which lasted approximately ten minutes. James was airlifted to UNC Hospital and remained there for three to four days.

As a result of the events described above, defendant was indicted on two counts of assault with a deadly weapon inflicting serious injury against James and Hicks and one count of assault by pointing a gun against Windham. Defendant was tried jointly with Hicks, who was indicted on one count of assault with a deadly weapon inflicting serious injury against defendant.

Eleven witnesses—including defendant and Hicks—testified at trial, and video footage captured by the security cameras was played for the jury during Windham's testimony, which was consistent with the video. The video showed defendant sitting on Robert's tailgate in the parking lot; retrieving the gun from his vehicle prior to the three men exiting the SUV; approaching Windham and pointing the gun in his face; approaching James and pistol-whipping him in the face; being struck by Hicks with the bat; getting an axe handle from his vehicle as

the fighting slowed; and hitting James in the head with the axe handle before turning it on Hicks and Robert.

On cross-examination by Hicks's attorney, defendant admitted to retrieving the loaded gun from his vehicle before James, Windham, or Hicks even opened the doors of the SUV. Defendant explained that he could see "the white in [the men's] eyes" and knew he was in trouble; he further claimed to have feared for his life.

At the close of the State's evidence, defendant made a motion to dismiss the charges against him on the grounds that the State "did not present substantial evidence that he did not act in self-defense." The trial court denied defendant's motion to dismiss, which was properly renewed and again denied at the close of all the evidence.

At defendant's request, the trial court instructed the jury using the pattern jury instructions for the offense of assault by pointing a gun as well as for the legal justification of self-defense. The trial court began its charge by instructing the jury that the State was required to prove two things beyond a reasonable doubt: first, that defendant "pointed a gun at Skylar Windham," and second, that defendant "acted intentionally and without justification or excuse." The trial court continued:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally pointed a gun at Skylar Windham, nothing else appearing, it would be your duty to return a verdict of guilty. If you do not so find or you have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.
>
> Even if you are satisfied beyond a reasonable doubt that the defendant committed an assault by pointing a gun, you may return a verdict of guilty only if the State has also satisfied you beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, if the defendant did not reasonably believe that the defendant's action was necessary or appeared to be necessary to protect the defendant from bodily injury or offensive physical contact, or the defendant used excessive force, or the defendant was the aggressor, the defendant's actions would not be excused or justified in defense of the defendant. If you do not so find or you have a reasonable doubt that the State has proved any of these things, then the defendant's

> actions would be justified by self-defense and it would be your duty to return a verdict of not guilty.

Defendant did not object to any portion of the jury charge or omission therefrom prior to the jury retiring for deliberations.

While the jury was unable to reach a verdict as to Hicks, it found defendant guilty of assault with a deadly weapon inflicting serious injury against James, assault with a deadly weapon against Hicks, and assault by pointing a gun against Windham. The trial court sentenced defendant to 22 months' incarceration, suspended on the condition that he serve 36 months' supervised probation and spend 30 days in jail, pay the requisite jail fees, and not threaten or assault the complaining parties.

As to restitution, James testified at the sentencing hearing that he had outstanding medical bills in the amount of $10,260.00 as a result of defendant's conduct. A bill from UNC Hospital dated 7 April 2014 was presented as a five-page fax dated 24 August 2016, which James testified to requesting in preparation for trial. Defendant did not object to the bill being admitted into evidence, but he did argue that the amount still outstanding was not up-to-date; it was also unclear what, if any, portion of the bill had been covered by insurance. The trial court thus held the issue of restitution open to determine if a more recent bill could be obtained. In the meantime, defendant entered written notice of appeal.

On 5 December 2016, the trial court reconvened for a follow-up hearing to address the sole remaining issue of restitution. James was present at that hearing as well, but he did not testify. The State informed the trial court that "as late as October 28, [they] were receiving the same faxed materials regarding UNC Hospital in terms of the $10,000.00. [They] also had, on behalf of the doctors, [an outstanding bill] in the amount of $1,947.80." The State explained that it had later determined the $10,000.00 amount had been "written off" by both UNC Hospital and its collection agency; thus, the only remaining bill was from UNC doctors in the amount of $1,962.80, including interest. The State further explained that the doctors' bill had been turned over to a separate collection agency and had not been written off. However, no testimony or documentation was presented as to the doctors' bill.

In addition to the conditions set forth in its initial sentencing judgment, the trial court ordered at the follow-up hearing that defendant pay restitution in the amount of $1,962.80. Defendant gave oral notice of appeal from that ruling.

Discussion

On appeal, defendant argues the trial court erred by (I) omitting the phrase "without legal justification" from its final mandate to the jury for the offense of assault by pointing a gun; (II) denying defendant's motion to dismiss, where defendant contends the State's evidence showed he acted in self-defense following a violent assault; and (III) ordering restitution in the amount of $1,962.80.

I. Jury Instructions

[1] Defendant first contends the trial court erred by omitting the essential element of "without legal justification" from the mandate portion of the pattern jury instructions for assault by pointing a gun. He argues further that the trial court should not have included the phrase "nothing else appearing" in the mandate. Defendant asserts that "[b]ecause the jury may have acted on the incorrect part of the instructions, [he] must receive a new trial on this charge."

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]" N.C. R. App. P. 10(a)(2); *see also State v. Schiro*, 219 N.C. App. 105, 115, 723 S.E.2d 134, 141 (2012).

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4).

Defendant here failed to object to the jury instructions at trial. In his brief, defendant ignores this failure, asserting simply that "[w]here a defendant requests and the trial court agrees to give a pattern jury instruction, any error in the actual instruction is reviewed *de novo*." Defendant does not contend on appeal that the alleged error in the jury instructions amounts to plain error.

Because defendant failed to properly preserve this issue for appellate review by lodging an objection at trial, and because defendant has failed to specifically and distinctly allege plain error, we dismiss this portion of defendant's appeal. *See State v. Goss*, 361 N.C. 610, 622, 651

S.E.2d 867, 875 (2007) (holding that defendant had waived an alleged constitutional error by failing to object at trial or to assign plain error on appeal).

II. Motion to Dismiss

[2] Defendant next contends the trial court erred in denying his motion to dismiss the charges against him due to insufficiency of the evidence. Defendant asserts that "the State's own, credible evidence showed he acted in self-defense after he was violently assaulted." Defendant relies primarily on *State v. Johnson*, 261 N.C. 727, 136 S.E.2d 84 (1964), to support his argument that because the State's evidence tended only to exculpate defendant, his motion to dismiss should have been granted.

We review the trial court's ruling on a motion to dismiss *de novo*. *See State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, the relevant inquiry is "whether the State presented 'substantial evidence' in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and internal quotation marks omitted). Further, a " 'substantial evidence' inquiry examines the sufficiency of the evidence presented but not its weight." *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citations omitted). Thus, "if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (citations, internal quotations marks, and brackets omitted).

In *State v. Johnson*, the defendant was convicted of manslaughter for stabbing a man after he broke open the door of her home and attempted to grab her. 261 N.C. at 729, 136 S.E.2d at 86. At trial, the defendant had testified that the man had physically assaulted her earlier on the day of the stabbing as well as three or four months prior, had been told to leave the defendant's home and to stay away, and had been drinking. *Id.* Witnesses corroborated the defendant's testimony, and the State presented no contradictory evidence. Nevertheless, the trial court denied the defendant's motion to dismiss. *Id.*

In reversing the defendant's conviction, our Supreme Court in *Johnson* held that "[w]hen the State introduces in evidence exculpatory

statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *Id.* at 730, 136 S.E.2d at 86. Furthermore, "[w]hen the State's evidence and that of the defendant is to the same effect and tends only to exculpate the defendant, motion for nonsuit should be allowed." *Id.* Thus, because the evidence in *Johnson* tended only to show that the defendant "had the right to stand her ground, protect her person, [and] prevent the invasion of her home," the trial court erred in denying the defendant's motion to dismiss. *Id.*

The instant case is readily distinguishable from *Johnson* in that the evidence here did not tend only to exculpate defendant. Rather, defendant's own testimony—regardless of the fact that he claimed to have feared for his life—demonstrated that he was waiting for Robert in the parking lot and retrieved a loaded gun from his vehicle before James, Windham, or Hicks even opened the doors of the SUV. Moreover, multiple witnesses testified and video footage tended to show that defendant acted as the aggressor. Thus, because there was substantial evidence to contradict defendant's claim of self-defense, the trial court did not err in denying defendant's motion to dismiss.

III. Amount of Restitution

[3] In his final argument on appeal, defendant contends there was insufficient evidence to support the trial court's restitution award in the amount of $1,962.80 to compensate James Noeth for medical expenses. Defendant asserts that the State offered no evidence at all—through testimony or documentary submission—to support the unsworn statements of the prosecutor indicating that a collection agency was still seeking payment from James.

Even absent an objection, awards of restitution are reviewed *de novo*. *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011). The restitution award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005). Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal. *Id.*

Although the quantum of evidence needed to support a restitution award is not high, the amount awarded nevertheless "must be supported by evidence adduced at trial or at sentencing." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (citation and quotation marks omitted). "[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *Id.* (citation

omitted). Unsworn statements of a prosecutor are also insufficient. *McNeil*, 209 N.C. App. at 668, 707 S.E.2d at 684. When no evidence supports the award, the award of restitution will be vacated, and the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing. *Id.* (remanding when there was evidence of physical damage to victim's property but no evidence as to appropriate amount of restitution); *see also State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 563 (2016).

Here, the transcripts from both the initial sentencing hearing and the follow-up hearing indicate that the trial court's restitution award was not supported by the evidence.

While James testified at the sentencing hearing and was present at the follow-up hearing, his testimony concerned only the UNC Hospital bill in the approximate amount of $10,000.00. Based on his testimony, James knew very little about the status of the bill or his insurance coverage. The only documentation submitted to the trial court at either hearing consisted of the faxed and outdated bill from UNC Hospital, which the State later determined had been "written off." No testimony or documentation was submitted to support an award based on the UNC doctors' bill.

Because there was no evidence adduced at trial or sentencing to support the trial court's restitution award of $1,962.80, we vacate the award and remand the restitution portion of defendant's sentence for a new sentencing hearing.

Conclusion

As defendant neither objected to the jury instructions at trial nor alleges plain error in his brief, he has waived appellate review of this issue. Additionally, because there was substantial evidence to contradict defendant's claim of self-defense, the trial court did not err in denying his motion to dismiss. Lastly, because the State's evidence failed to support the trial court's restitution award of $1,962.80, we vacate the award and remand the restitution portion of that judgment for a new sentencing hearing.

DISMISSED IN PART; NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ERIC FERRER, DEFENDANT

No. COA17-655

Filed 7 August 2018

Fraud—insurance fraud—fatal variance between evidence and indictment

The trial court erred in denying defendant's motion to dismiss his conviction for insurance fraud because the State failed to present evidence that defendant made a fraudulent representation to the insurance company named in the indictment. Although there was evidence that defendant made a fraudulent representation to the insurer which covered the business that leased the building where the illegal fire was set, defendant was only charged with defrauding the insurer that covered the building.

Appeal by defendant from judgment entered on or about 12 September 2016 by Judge W. Osmond Smith, III in Superior Court, Person County. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, III, by Assistant Attorney General Tracy Nayer, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting him of insurance fraud. Because the State presented no evidence defendant made fraudulent representations in support of an insurance claim to The Hartford Insurance Company as alleged by the indictment, the trial court should have allowed defendant's motion to dismiss this charge. We therefore vacate his conviction for insurance fraud.

I. Background

Sunday, 16 December 2012, was not a happy day at the Happy Days Diner; it was set on fire that day. Happy Days Diner was operated by defendant and Ms. Iris Diaz in a building leased by Fawzi Bekhet. Ms. Diaz was approximately $16,000 in arrears on rent owed to Mr. Bekhet

and was scheduled to go to court the next day on Mr. Bekhet's claim for summary ejectment. After the fire, Ms. Diaz filed an insurance claim with The Hartford Insurance Company ("Hartford"). The building itself was insured by Nationwide Insurance ("Nationwide"), and Mr. Bekhet filed a claim for fire damage with Nationwide. Defendant gave a recorded statement to Nationwide representative Ms. Bonnie Locklear regarding Mr. Bekhet's claim.

Defendant was indicted for burning a commercial structure and for insurance fraud based upon the insurance claim made upon the insurance with Hartford. After a jury trial, defendant was found guilty of both charges. Defendant timely gave oral notice of appeal.

II. Insurance Fraud

Defendant does not challenge his judgment for his conviction of burning a commercial structure but only contends the trial court should have allowed his motion to dismiss the charge of insurance fraud because the State presented no evidence defendant "[m]ade a [f]raudulent [s]tatement to Hartford Insurance[.]"[1]

To defendant's argument there was no evidence he made any fraudulent statement to Hartford, we say, "exactamundo." The trial court should have granted his motion to dismiss.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

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1. Defendant's second argument on appeal is that if his motion to dismiss the charge of insurance fraud was not properly preserved then his attorney provided ineffective assistance of counsel and this Court should still review his first argument under Rule 2 of the North Carolina Rules of Appellate Procedure. We and the State agree that defendant's counsel adequately preserved the motion to dismiss on his charge of insurance fraud, so we need not address defendant's second argument.

> The elements for insurance fraud include that the accused presented a statement in support of a claim for payment under an insurance policy, that the statement contained false or misleading information concerning a fact or matter material to the claim, that the accused knew that the statement contained false or misleading information, and that the accused acted with the intent to defraud.

State v. Payne, 149 N.C. App. 421, 426–27, 561 S.E.2d 507, 511 (2002); *see* N.C. Gen. Stat. § 58-2-161 (2011).

The indictment for insurance fraud alleged that defendant presented "a written and oral statement as part of a claim for payment pursuant to an insurance policy" with "intent to defraud an insurer, The Hartford Insurance Company." (Original in all caps.)

> It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment. It is also settled that a fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment.

State v. Faircloth, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979) (citations omitted).

As noted above, defendant gave a statement to Nationwide regarding Mr. Bekhet's claim, not to Hartford, the insurer for Ms. Diaz's claim. No statement from defendant, written or oral, to Hartford was in evidence. The State directs us to Exhibit 13, the audio recording of an interview of defendant by Ms. Locklear of Nationwide. The State directs us to portions of the interview where: defendant acknowledges the fire was determined to be arson; defendant states he had spoken with a special investigator from Hartford; defendant denies being involved with setting the fire; Ms. Locklear says she is "going to go over . . . just some financial information cause we usually cover it. I'm sure the guy probably at Hartford did too . . ." to which defendant responds, "Yeah[;]" and Ms. Locklear asks, "What are you guys claiming with Hartford that you lost?" to which defendant responds, "I think right now it's just the food . . . ." The State then argues that based on these noted portions of the interview it could be

> reasonably deduced or inferred that the Hartford Insurance Company's special investigator asked defendant whether he was responsible for setting fire to the Happy Days Diner, and that defendant made the same false and misleading statement to the Hartford Insurance Company investigator that he made to Ms. Locklear when he denied being involved with setting fire to the Happy Days Diner in response to Ms. Locklear's direct questions regarding the same.

In other words, the State asks that we read the comment, "I'm sure the guy probably at Hartford did too . . ." and the defendant's response, "Yeah," to mean that defendant made specific fraudulent representations to Hartford. The State simply asks that we infer too much from this vague comment and response. There is no doubt that defendant made fraudulent representations to Nationwide, but defendant was not charged for those representations. Since the Nationwide statement was the State's only evidence, the trial court erred in denying defendant's motion to dismiss.

III. Conclusion

Because there was insufficient evidence of insurance fraud, the trial court should have granted defendant's motion to dismiss; thus, we vacate that judgment.

VACATED.

Judges DAVIS and ARROWOOD concur.

STATE v. GRIFFIN

[260 N.C. App. 629 (2018)]

STATE OF NORTH CAROLINA
v.
THOMAS EARL GRIFFIN, DEFENDANT

No. COA17-386

Filed 7 August 2018

1. Appeal and Error—preservation of issues—constitutional argument—raised in and decided by trial court

The State's argument that defendant waived his right to challenge his enrollment in satellite-based monitoring as violating the Fourth Amendment was rejected by the Court of Appeals, because the trial court specifically addressed defendant's right to be free from unreasonable searches at his bring-back hearing.

2. Satellite-Based Monitoring—Fourth Amendment—reasonableness—evidentiary support—effectiveness to protect public

The State's failure to present evidence that satellite-based monitoring (SBM) was effective in protecting the public from recidivist sex offenders violated the Fourth Amendment's prohibition against unreasonable searches and necessitated the reversal of the trial court's order requiring defendant to enroll in SBM for thirty years.

Judge BRYANT dissenting.

Appeal by Defendant from order entered 1 September 2016 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 19 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

INMAN, Judge.

In light of this Court's recent decision in *State v. Grady*, __ N.C. App. __, __ S.E.2d __, COA17-12, 2018 WL 2206344 (15 May 2018) ("*Grady II*"),[1]

1. In the interest of clarity, we refer to this cited decision as *Grady II* and refer to the United State Supreme Court's preceding and related decision as *Grady I*.

absent any evidence that satellite-based monitoring ("SBM") is effective to protect the public from sex offenders, the trial court erred in imposing SBM on a sex offender for thirty years. We therefore reverse the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

On 29 January 2004 in Craven County Superior Court, before the Honorable Benjamin G. Alford, Thomas Earl Griffin ("Defendant") proffered an *Alford* plea, as a part of a negotiated plea agreement, to the charge of first-degree sex offense with a child. As a part of the plea agreement, the court dismissed a charge of taking indecent liberties with a child.

The State's recitation of the facts during the plea hearing stated that Defendant was the live-in boyfriend of the victim's mother. The victim, who was eleven years old at the time of the initial disclosure, stated that Defendant had "been messing with her for the past three years," describing penile and digital penetration, as well as penetration with the use of a foreign object. Defendant made a full confession, admitting all of what the victim reported. The court sentenced Defendant to a prison term of 144 to 182 months[2] and recommended that while incarcerated Defendant participate in the SOAR program (a sex offender treatment program).

Defendant was released from prison eleven years later, in June 2015. On 29 September 2015, the Department of Public Safety informed Defendant that his was a reportable sex offense as defined by N.C. Gen. Stat. § 14-208.6(4) and that he could be required to enroll in an SBM program pursuant to N.C. Gen. Stat. § 14-208.40(a)(2), as determined by a court. Defendant was instructed to appear for a "bring-back" hearing to determine whether he would be required to participate in an SBM program.

The bring-back hearing was conducted on 16 August 2016, in Craven County Superior Court, again before Judge Alford. The State introduced into evidence a "Revised STATIC-99 Coding Form" ("Static-99"), an actuarial report designed to estimate the probability of sex offender recidivism, which placed Defendant in the "moderate-low" category, above the "low" and below the "moderate-high" and "high" risk categories.[3]

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2. First-degree sex offense is a B1 felony punishable by a maximum sentence of life imprisonment without parole for offenders with at least a Level V prior record level. Defendant, whose only prior convictions were for driving without a license and registration and fishing without a license, was a Level I offender. *See* N.C. Gen. Stat. § 15A-1340.17 (2017).

3. Though unchallenged before the trial court, Defendant argues on appeal that his Static-99 was miscalculated and that his risk category should have been "low" risk.

The State also called as a witness Probation and Parole Officer Caitlin Allen, who supervised Defendant and other sex offenders. Based on her review of Defendant's prison records and her own supervision, Officer Allen testified that while in prison, Defendant had not completed the SOAR program and that, since his release from prison, Defendant had not committed any criminal offenses or violated the terms of his probation, including restrictions on his location.

Officer Allen also described the physical dimensions of the SBM tracking device, how it is worn, and its general function. The State presented no evidence regarding how information gathered through SBM of Defendant would be used. The State presented no evidence regarding whether, or to what degree, SBM would be effective in protecting the public from Defendant committing another sex offense.

The prosecutor stated her belief that Defendant could be ordered to participate in an SBM program for a term of years, but not life, and "ask[ed] that [the court] find that this was a – that the Satellite Based Monitoring [was] a reasonable search." The prosecutor noted that the victim was a young child, eighteen years younger than Defendant, and that by virtue of his living arrangement with the victim's mother, Defendant held a position of trust in the victim's household. In response, counsel for Defendant argued that based on his "moderate to low level – level of risk" and his compliance with all terms of his probation, "this level of intrusion" was not warranted. The trial court took the matter under advisement without commenting on the merits of either the State's or Defendant's arguments.

On 1 September 2016, the trial court entered a form order finding that Defendant had been convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6 and involving the physical, mental, or sexual abuse of a minor. The order also found that Defendant was not classified as a sexually violent predator, was not a recidivist, and was not convicted of an aggravated offense. The trial court also entered, on an attached form, the following additional findings and a conclusion of law:

> 1. The defendant failed to participate in and[/]or complete the SOAR program.
>
> 2. The defendant took advantage of the victim's young age and vulnerability: the victim was 11 years old the defendant was 29 years old.
>
> 3. The defendant took advantage of a position of trust; the defendant was the live-in boyfriend of the victim's

> mother. The family had resided together for at least four years and [defendant] had a child with the victim's mother.
>
> 4. Sexual abuse occurred over a three year period of time.
>
> The court has weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the publics [sic] right to be protected from sex offenders and the court concludes that the publics [sic] right of protection outweighs the "de minimis" intrusion upon the defendant's Fourth Amendment rights.

Based on these findings and conclusion, the trial court ordered Defendant to register as a sex offender and enroll in SBM for a period of thirty years.

Defendant appeals.

II. ANALYSIS

Defendant does not challenge being ordered to register as a sex offender,[4] but argues that the trial court violated his Fourth Amendment rights by ordering him to submit to continuous SBM for thirty years. After careful review of the record and applicable law, we are compelled to agree.

A. Preservation of Issue

[1] "Our appellate courts will only review constitutional questions raised and passed upon at trial." *State v. Mills*, 232 N.C. App. 460, 466, 754 S.E.2d 674, 678 (2014) (citations omitted).

The State argues that Defendant waived the sole issue he raises on appeal—the constitutionality of the order directing him to enroll in the SBM program— asserting "Defendant made no Fourth Amendment challenge either before or at the SBM determination hearing." We reject this argument because the question of whether Defendant's enrollment in an SBM program constituted a reasonable search was directly raised and passed upon by the trial court.

During the bring-back hearing, the prosecutor "ask[ed] that [the court] find . . . Satellite Based Monitoring [was] a reasonable search." In response, Defendant argued that "this level of intrusion" was not

4. As a sex offender, Defendant is subject to a reporting requirement where by statute he must maintain registration with the sheriff of the county in which he resides. *See* N.C. Gen. Stat. § 14-208.7(a) (2017).

warranted. In its order directing Defendant to enroll in a SBM program, the trial court specifically addressed "the Fourth Amendment right of . . . defendant to be free from unreasonable searches . . . [and] the publics [sic] right to be protected" and concluded that the public's right to be protected outweighed Defendant's privacy right.

We hold that Defendant's appeal presents a constitutional question raised and passed upon by the trial court, *see id.* at 466, 754 S.E.2d at 678, and is now properly before this Court.

B. Standard of Review

> In reviewing [the superior court's order], we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). This Court reviews "the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010) (citation and quotation marks omitted). "We will therefore review the trial court's order to ensure that the determination that 'defendant requires the highest possible level of supervision and monitoring' 'reflects a correct application of law to the facts found.' " *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citations and brackets omitted).

Williams, *Singleton*, *Kilby*, and a plethora of other decisions regarding SBM were rendered by this Court and the North Carolina Supreme Court prior to the decision by the United States Supreme Court in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 462 (2015) (per curiam) ("*Grady I*"), which held that North Carolina's SBM program effects a search subject to protections of the Fourth Amendment of the United States Constitution.

"The standard of review for alleged violations of constitutional rights is de novo." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

C. Fourth Amendment to the United States Constitution

The Fourth Amendment to the United States Constitution sets forth "[t]he right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015).

Grady I did not invalidate all SBM orders, noting that "[t]he Fourth Amendment prohibits only *unreasonable* searches." *Grady I*, 575 U.S. at ___, 191 L. Ed. 2d at 462 (emphasis in original). *Grady I* vacated the SBM order and remanded the case to the trial court to determine whether SBM was reasonable based on the totality of the circumstances, "including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at 462.

Following the defendant's appeal from a trial court hearing on remand from *Grady I*, this Court in *Grady II* established new criteria for court orders allowing the government to track the location of sex offenders by SBM. *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 8. Following earlier decisions by this Court, *Grady II* held that the State bears the burden of proving that SBM is reasonable. *Id.* at __, __ S.E.2d at __, slip op. at 8; *see also State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016). And, for the first time in any North Carolina appellate court decision regarding SBM, *Grady II* held that absent evidence that SBM is *effective* in serving the State's compelling interest in protecting the public from sex offenders, the State failed to meet its burden to prove that SBM is reasonable as required by the Fourth Amendment. *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 8.

D. Evidence that SBM is Effective to Protect the Public from Sex Offenders

[2] Following the United States Supreme Court's remand order in *Grady I* and a new SBM hearing in the trial court, this Court held in *Grady II* that the trial court violated the Fourth Amendment rights of the defendant in that case, a recidivist sex offender, by ordering lifetime SBM absent any evidence that SBM is effective to protect the public against sex offenses. __ N.C. App. at __, __ S.E.2d at __, slip op. at 8. This Court noted that although the SBM program had been in effect for approximately a decade prior to the hearing on remand from the United States Supreme Court, "the State failed to present any evidence of its efficacy in furtherance of the State's undeniably legitimate interests" and held that in the absence of evidence regarding the efficacy of SBM, "we are compelled to conclude that the State failed to carry its burden" of proving that SBM was reasonable in that case. *Id.* at __, __ S.E.2d at __, slip op. at 8.

In this case, as in *Grady II*, the State presented no evidence regarding the efficacy of the SBM program. The State argues that it was unnecessary to present such evidence in order to establish its interest in protecting the public from sex offenders[5] because "one cannot discount the possibility that an offender's awareness his location is being monitored does in fact deter him from committing additional offenses." The State further relies on decisions from other jurisdictions stating that SBM curtails sex offender recidivism.

Our dissenting colleague, who also dissented in *Grady II*, cites the State's Memorandum in Support of Reasonableness of Satellite Based Monitoring submitted to the trial court, noting "the memo outlines empirical evidence and argument as to the statistical likelihood that a sex offender would be a recidivist." The memorandum, however, cited only other court decisions, not evidence, and it did not attach empirical or statistical reports. This approach has been rejected by the United States Court of Appeals for the Fourth Circuit in a decision regarding the constitutionality of premises restrictions for sex offenders:

> The State tries to overcome its lack of data, social science or scientific research, legislative findings, or other empirical evidence with a renewed appeal to anecdotal case law, as well as to "logic and common sense." But neither anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof.

Doe v. Cooper, 842 F.2d 833, 846 (4th Cir. 2016) (citations omitted).

Decisions from other jurisdictions relied upon by our dissenting colleague—and by the State—holding that SBM is generally regarded as effective in protecting the public from sex offenders are not persuasive in light of this Court's binding decision in *Grady II* that the State must present some evidence to carry its burden of proving that SBM actually serves that governmental interest.[6]

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5. The State also argues that North Carolina's SBM program should be evaluated as a "special needs" program. But the record reflects that the State failed to present this argument to the trial court. "Since the State failed to advance this constitutional argument below, it is waived." *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 3.

6. Also, in contrast to the trial court's order reviewed in *Grady II*, which relied upon some of those decisions, the trial court's order in the case now before us did not refer to any case authorities, or empirical or statistical reports referenced in case authorities, or otherwise. Nor did the trial court indicate in the SBM hearing that it had reviewed the State's legal memorandum or relied upon any of the authorities cited therein.

Our dissenting colleague asserts that requiring the State to introduce evidence that SBM is effective in every SBM hearing, regardless of evidence regarding other relevant circumstances, exceeds the holding of the United States Supreme Court in *Grady I*. However, we are bound by this Court's decision in *Grady II* and cannot hold otherwise. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Our dissenting colleague also asserts that our decision exceeds the holding in *Grady II* by requiring, as a threshold in every SBM case, evidence to support a finding by the trial court that SBM will serve the government purpose of curbing recidivism. But following the reasoning of this Court in *Grady II*, unless SBM is found to be effective to actually serve the purpose of protecting against recidivism by sex offenders, it is impossible for the State to justify the intrusion of continuously tracking an offender's location for any length of time, much less for thirty years.

As noted by this Court in *Grady II*, and by the United States Supreme Court, the continuous and dynamic location data gathered by SBM is far more intrusive than the static information gathered as a result of sex offender registration. " 'GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.' " *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 6 (*quoting United States v. Jones*, 565 U.S. 400, 415, 181 L.Ed.2d 911, 924 (Sotomayor, J., concurring)). In one aspect, the intrusion of SBM on Defendant in this case is greater than the intrusion imposed in *Grady II*, because unlike an order for lifetime SBM, which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review by the trial court. *See* N.G. Gen. Stat. § 14-208.43 (removal procedure available only for lifetime SBM participants).

We also are bound by this Court's holding in *Grady II* that when the State has presented no evidence that could possibly support a finding necessary to impose SBM, the appropriate disposition is to reverse the trial court's order rather than to vacate and remand the matter for re-hearing. __ N.C. App. at __, __ S.E.2d at __, slip op. at 8 (emphasizing "the State will have only one opportunity to prove that SBM is a reasonable search of the defendant") (citing *State v. Greene*, __ N.C. App. __, __, 806 S.E.2d 343, 345 (2017)).

E. Defendant's Current Threat of Reoffending

This Court in *Grady II* also held that a trial court cannot impose SBM without "sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to *this particular defendant*."

__ N.C. App. at __, __ S.E.2d at __, slip op. at 6 (emphasis in original). The Court "reiterate[d] the continued need for individualized determinations of reasonableness at *Grady* hearings." *Id.* at __, __ S.E.2d at __, slip op. at 8.

Here, unlike in *Grady II*, the State introduced in evidence Defendant's Static-99 risk factor assessment, which reflected that he was a "moderate-low risk" for reoffending. In addition, the State presented evidence, and the trial court found as a fact, that Defendant had violated a position of trust in committing his offense and had failed to complete or participate in a court ordered SOAR program for sex offenders while incarcerated. The SBM order did not reflect in any finding or conclusion whether the trial court determined that Defendant's betrayal of trust or failure to complete or participate in SOAR increased his likelihood of recidivism.

Pre-*Grady I*, this Court held that a Static-99 moderate-low risk assessment, without additional evidence independent of factors considered in the assessment, was insufficient to support the imposition of SBM on a sex offender. *Kilby*, 198 N.C. App. at 370, 679 S.E.2d at 434; *State v. Thomas*, 225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013) (holding that statutory language allowing the trial court to make additional findings is to permit the court to consider factors not part of the Static-99 assessment).

In light of our holding that the State failed to prove that SBM is a reasonable search compliant with the Fourth Amendment because it presented no evidence that the SBM program is effective to serve the State's interest in protecting the public against sex offenders, we do not reach the issue of whether the trial court's order or the State's evidence presented regarding Defendant's individual threat of reoffending meets the minimum constitutional standard required by *Grady I* and *Grady II*.

CONCLUSION

We hold that because the State failed to present any evidence that SBM is effective to protect the public from sex offenders, this Court's decision in *Grady II* compels us to reverse the trial court's order requiring Defendant to enroll in SBM for thirty years.

REVERSED.

Judge DAVIS concurs.

Judge BRYANT dissents in separate opinion.

BRYANT, Judge, dissenting.

By requiring our trial courts to find the efficacy of SBM in curbing sex offender recidivism in order to satisfy Fourth Amendment protections against unreasonable searches in the context of SBM, the majority would impose a standard other than is required by Fourth Amendment jurisprudence. I respectfully dissent.

"The touchstone of the Fourth Amendment is reasonableness." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (citation omitted). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *State v. Grady*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA17-12, 2018 WL 2206344, slip op. at 2 (N.C. Ct. App. May 15, 2018) (hereinafter "*Grady II*") (quoting *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2 459, 462 (2015) (per curiam)).

In support of its reasoning, the majority relies on this Court's 2018 *Grady II* opinion holding that the State failed to carry its burden of proving that SBM was reasonable. In addition to outlining categories of evidence the State failed to present (e.g., "specific interest in monitoring defendant," "general procedures used to monitor unsupervised offenders," *id.* at ___, ___ S.E.2d at ___, slip op. at 7), the *Grady II* majority also stated, "the State failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interests." *Id.* at ___, ___ S.E.2d at ___, slip op. at 8.

I would note that the majority in *Grady II* drew this conclusion in the context of a discussion of the defendant's diminished expectations of privacy. *See id.* at ___, ___ S.E.2d at ___, slip op. at 4 ("The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate." (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654, 132 L. Ed. 2d 564, 575 (1995)). The Court observed that "it [was] unclear whether the trial court considered the legitimacy of [the] defendant's privacy expectation . . . [and] the extent to which the search intrude[d] upon reasonable expectations of privacy." *Id.* at ___, ___ S.E.2d at ___, slip op. at 5 (citation omitted). In regard to continuous GPS monitoring, the *Grady II* opinion states that "[a]lthough the State has no guidelines for the presentation of evidence at *Grady* hearings, . . . there must be sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to [*the*] *particular defendant*." *Id.* at ___, ___ S.E.2d at ___, slip op. at 6. On the record before it, the Court observed that "the State presented no

evidence of [the] defendant's current threat of reoffending and . . . the circumstances of his convictions d[id] not support the conclusion that lifetime SBM [was] objectively reasonable." *Id.*

In the absence of evidence describing the defendant's likelihood of recidivism, the Court turned its focus to whether the State presented "any evidence concerning its specific interests in monitoring [the] defendant." *Id.* at ___, ___ S.E.2d at ___, slip op. at 7. The Court noted that "the State failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interest," in opposition to the defendant's proffer of "multiple reports . . . rebutting the widely held assumption that sex offenders recidivate at higher rates that other groups." *Id.* at ___, ___ S.E.2d at ___, slip op. 8. While the *Grady II* Court majority concluded "that the State failed to carry its burden," *id.*, the Court did not state or imply that the State's burden of proof to establish that SBM was reasonable included establishing the efficacy of SBM in curbing sex offender recidivism for *every* SBM case; it was simply a consideration amongst the totality of the circumstances.

In the instant case, the majority bases the reasonableness of the SBM search of defendant Griffin solely on its holding that the State presented no evidence of the efficacy or effectiveness of the program.[1] Such reasoning unnecessarily imposes upon trial courts a standard other than that which is required by Fourth Amendment jurisprudence: to determine whether a search is reasonable based on "the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, ___ S.E.2d at ___, slip op. 2 (quoting *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462). Further, by making that standard a necessary finding, as opposed to the broader standard which considers a defendant's expectation of privacy and the extent to which the search intrudes upon reasonable expectations of privacy, the majority forecloses the ability of the trial court to determine the reasonableness of a search based on the totality of circumstances.

Having disagreed with the majority's opinion that the holding in *Grady II* is based on lack of evidence of the efficacy of the SBM program, I must note that the record in the instant case does contain such evidence. In the record proper is a document entitled "Memorandum In Support of The Reasonableness of [SBM]." The memo outlines empirical

1. "We hold that because the State failed to present any evidence that SBM is effective to protect the public from sex offenders, this Court's decision in *Grady II* compels us to reverse the trial court's order requiring Defendant to enroll in SBM for thirty years."

evidence and argument as to the statistical likelihood that a sex offender would be a recidivist. However, this evidence would likely not meet the majority's standard which seems to require statistical data on the recidivism rates of North Carolina offenders in order to determine the efficacy of the SBM program.

As I noted in my dissent in *Grady II*, while the presentation of evidence regarding the rate of recidivism by sex offenders "may be a valid legislative argument, I do not believe it to be a persuasive argument that defendant's participation in the SBM program, when viewed as a search, was unreasonable." *Id.* at ___, ___ S.E.2d at ___, slip op. 11 n.11.

For the reasons stated above, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
WILLIAM BURNETT LINDSEY, DEFENDANT

No. COA17-676

Filed 7 August 2018

Appeal and Error—preservation of issues—constitutional argument—waiver

Defendant waived a constitutional argument that the imposition of satellite-based monitoring was not reasonable under the Fourth Amendment by failing to raise the issue in the trial court, either explicitly or implicitly.

Appeal by defendant from order entered on or about 10 November 2016 by Judge Charles H. Henry in Superior Court, Craven County. Heard in the Court of Appeals 29 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order requiring him to enroll in North Carolina's sex offender satellite-based monitoring ("SBM") program. Because defendant raised no objection under the Fourth Amendment at the SBM hearing and the issue was not implicitly addressed or ruled upon by the trial court, it was not preserved for appellate review. In our discretion, we decline to grant review under Rule 2 since the law was well-established at the time of the hearing and the State was not on notice of the need to address *Grady* issues due to defendant's failure to raise any constitutional argument. Since defendant raised no other argument about the SBM order, we affirm.

I. Background

In 2009, defendant pled guilty to taking indecent liberties with a child. *See State v. Lindsey*, ___ N.C. App. ___, 789 S.E.2d 568, at *2 (June 21, 2016) (COA15-1251) (unpublished) ("*Lindsey I*"). Defendant was ordered to enroll in SBM, *id.* at *3, and "[d]efendant appeal[ed] from [the] order of the trial court requiring him to enroll in North Carolina's sex offender satellite-based monitoring ('SBM') program." *Id.* at *1. "Because the trial court failed to make the statutorily-required finding that defendant 'requires the highest possible level of supervision and monitoring[,]' N.C. Gen. Stat. § 15A-208.40B(c) (2015)," this Court remanded for further proceedings. *Id.* at *1-2. In *Lindsey I*, defendant's arguments and this Court's ruling were based only upon the application of the SBM statute itself. *See Lindsey I*, ___ N.C. App. ___, 789 S.E.2d 568. Defendant raised no constitutional arguments in *Lindsey I*, nor did this Court's opinion address any constitutional issues. *See id.* This case was not remanded for what has now become known as a "*Grady* hearing" but only for a new hearing to address the statutory issues. *See id.*

On 30 March 2015, the United States Supreme Court issued its per curiam ruling in *Grady v. North Carolina*, holding that SBM is a search under the Fourth Amendment and therefore is subject to the constitutional requirements of the Fourth Amendment. *See Grady*, 135 S.Ct. 1368, 1371, 191 L. Ed. 2d 459 (2015) (per curiam). In *Grady*, the defendant had argued that SBM "would violate his Fourth Amendment right to be free from unreasonable search and seizures." *Id.*, 135 S.Ct. at 1369, 191 L. E. 2d at 460. Our Court stated,

> The United States Supreme Court held that despite its civil nature, North Carolina's SBM program "effects a Fourth Amendment search." *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015) (per curiam). However, since "[t]he Fourth Amendment

> prohibits only unreasonable searches[,]" the Supreme Court remanded the case for North Carolina courts to "examine whether the State's monitoring program is reasonable—when properly viewed as a search . . . . " *Id.* at ___,191 L. Ed. 2d at 463.

State v. Grady, ___ N.C. App. ___, ___ S.E.2d ___, *2-3 (May 15, 2018) (COA17-12).

Defendant's hearing on remand, as directed by *Lindsey I*, was held on 8 November 2016, over a year after the United States Supreme Court's ruling in *Grady*. *See generally Grady*, 135 S.Ct. 1368, 191 L. Ed. 2d 459. At the hearing on remand, defendant raised no constitutional objection to SBM based upon the Fourth Amendment or *Grady*. On or about 10 November 2016, the trial court again ordered defendant to enroll in SBM. Defendant appeals.

II. Petition for Writ of Certiorari

Although defendant timely filed a written notice of appeal after entry of the SBM order, he failed to specifically designate this Court as the court he was appealing to in the notice. Because of the defect in his notice of appeal, defendant filed a petition for certiorari with this Court due to his failure to designate this Court as the court he was appealing to in his notice of appeal. The State has claimed no prejudice on appeal due to defendant's failure to note he was appealing to this Court. In our discretion, we grant defendant's petition for certiorari to ensure his appeal is properly before us. *See generally Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) ("This Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari and grant it in our discretion." (citations and quotation marks omitted)).

III. Waiver

Defendant raises only one issue on appeal and argues that "[t]he [S]tate failed to meet its burden of proving that imposing SBM on Mr. Lindsey is reasonable under the Fourth Amendment." The State contends that defendant has waived his Fourth Amendment argument by his failure to raise the issue. The State, citing *State v. Stroessenreuther*, ___ N.C. App. ___, ___793 S.E.2d 734 (2016), argues that it has the burden to establish the reasonableness of SBM under the Fourth Amendment *only* if the defendant raises the issue at the hearing. *Stroessenreuther* states "[t]rial courts can (and must) consider a Fourth Amendment challenge to satellite-based monitoring *when a defendant raises it*." *Id.* at ___,

793 S.E.2d at 735 (emphasis added). The State contends that "[i]f this statement in *Stroessenreuther* is to have any meaning or application at all, then unless the defendant argues that SBM enrollment violates his Fourth Amendment rights to be free from unreasonable searches, the trial court need not conduct a reasonableness inquiry." Although "this statement in *Stroessenreuther*" was not the holding, it is a correct statement of the law. *See id.* Constitutional issues must be asserted by the defendant in other contexts, and this rule has equal application in a SBM hearing. *See e.g.*, *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("Defendant's argument is based upon his Fifth Amendment right to silence and his Sixth Amendment right to counsel. However, defendant did not raise these constitutional concerns before reaching this Court. The failure to raise a constitutional issue before the trial court bars appellate review. Based upon our long-established law, defendant has waived this issue, and he is barred from raising it on appellate review before this Court." (citations omitted)).

Defendant argues in his reply brief that the Fourth Amendment was implicitly raised, contending,

> "[t]he rule that constitutional questions must be raised first in the trial court is based upon the reasoning that the trial court should, in the first instance, "pass[] on" the issue." *State v. Kirkwood*, 229 N.C. App. 656, 665, 747 S.E.2d 730, 737 (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)), *appeal dismissed*, 367 N.C. 277, 752 S.E.2d 487 (2013). Consequently, when the record shows that "the trial court addressed and ruled upon" a constitutional issue, the "issue is properly before this Court" for review, despite any possible default by the appellant in preserving the issue. *Id.* at 665–66, 747 S.E.2d at 737; accord *In re Hall*, 238 N.C. App. 322, 329 n.2, 768 S.E.2d 39, 44 n.2 (2014) ("[S]ince the record supports a determination that the trial court reviewed and denied petitioner's *ex post facto* argument [regarding sex offender registration], we will review petitioner's contentions on appeal."); *State v. Woodruff*, No. COA13–812, 2014 WL 218397, at *1 (N.C. Ct. App. Jan. 21, 2014) (unpublished) (reviewing double jeopardy claim, despite defendant's failure to "explicit[ly] mention" issue at trial, when "trial court possibly addressed and ruled upon" issue). Here, as in *Kirkwood*, *Hall*, and *Woodruff*, Mr. Lindsey's *Grady* argument is "properly before this Court" for review because the trial

> court, consistent with the fundamental goal of Rule 10, "addressed and ruled upon" the issue in the first instance. *Kirkwood*, 229 N.C. App. at 665–66, 747 S.E.2d at 737. The state's waiver argument should be rejected.

In addition, defendant has requested we invoke Rule 2 of the Rules of Appellate Procedure to consider his constitutional issue.

This Court addressed a similar situation recently in *State v. Bursell*, ___ N.C. App. ___, ___, 813 S.E.2d 463 (2018). In *Bursell*, on 10 August 2016, the trial court ordered defendant to enroll in lifetime SBM following his guilty plea and sentencing for statutory rape and indecent liberties. ___ N.C. App. at ___, 813 S.E.2d at 464. On appeal, the defendant raised a constitutional argument based upon the Fourth amendment and *Grady*. *Id.* at ___, 813 S.E.2d at 465. The State contended that the constitutional issue was not preserved for review because "although defendant objected at sentencing to the orders of registration and SBM, . . . he neither referenced *Grady* nor "raised any objection that the imposition of SBM effected an unreasonable search in violation of the Fourth Amendment[.]" *Id.* at ___, 813 S.E.2d at 465 (ellipses and brackets omitted).

The *Bursell* Court noted that

> generally, constitutional errors not raised by objection at trial are deemed waived on appeal. However, where a constitutional challenge not clearly and directly presented to the trial court is implicit in a party's argument before the trial court, it is preserved for appellate review.

Id. at ___ 813 S.E.2d at 465 (citations, quotation marks, and brackets omitted). After reviewing the transcript of the SBM hearing, this Court determined that it was

> readily apparent from the context that his objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicates defendant's rights under *Grady* to a Fourth Amendment reasonableness determination before the imposition of SBM.

Id. at ___ 813 S.E.2d at 467.

We have also reviewed the transcript of the SBM hearing in this case, as compared to the portions of the transcript noted in *Bursell*, and even considering this case in accord with *Bursell*, here defendant

simply did not raise any constitutional objection, either explicity or implicitly. In *Bursell*, the SBM hearing was the initial hearing held immediately after sentencing. *Id.* at ___, 813 S.E.2d at 464. Here, the SBM hearing was held based upon this Court's directive in *Lindsey I*, where we remanded because the trial court had not made an explicit determination "that defendant requires the highest possible level of supervision and monitoring" and because "the court did not mark a box in paragraph 4 of the 'Findings' section on the AOC–CR–616 order form to indicate the basis for its decision to place defendant on satellite-based monitoring." *Lindsey I*, ___ N.C. App. ___, 789 S.E.2d 568, *1-7 (quotation marks omitted). And on remand, the State and trial court held a hearing as directed by *Lindsey I* where defendant did not -- even indirectly -- raise any constitutional argument regarding the reasonableness of SBM under the Fourth Amendment or *Grady*.

At the beginning of the hearing, the prosecutor called the matter for a SBM hearing and defendant agreed "this is a call-back hearing[:]"

> MS. HAWKINS: William Lindsey, number 207 on the calendar he is on for a Satellite Base Monitoring hearing.
>
> In Mr. Lindsey's hearing I have my probation officer here. I believe for purposes of time that the defendant will stipulate to the letter and to the service of that letter, and that he did indeed receive that letter; is that correct, Mr. Wilson?
>
> MR. WILSON: Yes, your Honor, this is a call-back hearing.[1]

With no further discussion of the purpose of the hearing, the State presented its evidence. The hearing was very brief and no evidence regarding a Fourth Amendment search analysis was presented. The State called only one witness, a probation officer, not defendant's, and admitted only one exhibit, a Static 99 risk assessment. Consistent with the directive of this Court in *Lindsey I*, the main focus of the hearing was whether defendant should be subject to SBM as "the highest possible level of

1. In *Lindsey I*, this Court noted, "The trial court held a 'bring-back hearing' on 14 July 2015 to determine defendant's eligibility for satellite-based monitoring. . . . When conducting a bring-back hearing under N.C. Gen. Stat. § 14-208.40B(c), the trial court is not bound by the DAC's risk assessment when assessing whether a defendant requires the highest possible level of supervision and monitoring." *Lindsey I*, ___ N.C. App. ___, 789 S.E.2d at 568, *2-4. Although defendant's counsel referred to it as a "call-back" hearing instead of a "bring back" hearing, his meaning is obvious and this hearing before the trial court was actually the "bring back" hearing on remand.

supervision and monitoring, N.C. Gen. Stat. § 15A-208.40B(c)[.]" *Id.* at ___ 789 S.E.2d 568, * 1-2.

After the testimony of the probation officer, the trial court asked to review "the investigative file that the DA may have in their possession in regards to the background, more detailed background of the charges and disposition[,]" and defendant had no objection to the trial court's review of this file. The trial court then adjourned the hearing until two days later to have "the opportunity to look at the investigative file" before making its decision. We are uncertain of the purpose of the trial court's review of the entire investigative file from defendant's 2009 prosecution, since it is well-established that SBM decisions must be based only upon the *elements* of the crime for which the defendant was convicted, whether by plea or trial, and not upon the facts alleged by the State in its prosecution.[2] *See State v. Santos*, 210 N.C. App. 448, 453, 708 S.E.2d 208, 212 (2011) ("[I]n *State v. Davison*, . . . we held that when making a determination pursuant to N.C.G.S. § 14–208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." (quotation marks omitted); *see also State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) ("The General Assembly's repeated use of the term 'conviction' compels us to conclude that, when making a determination pursuant to N.C.G.S. § 14–208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. In the case before us, the trial court erred when making its determinations by considering Defendant's plea colloquy in addition to the mere fact of his conviction.").

But whatever the purpose of the trial court's review of the file, a file from a 2009 prosecution would not contain the information needed for a *Grady* hearing. Yet the trial court used this information, as well as evidence from the hearing, to determine that defendant should be enrolled in SBM. In announcing its ruling, the trial court specifically referred to "the investigative report" at least twice and noted, "As I said the Court has reviewed the investigative report and indicated a series of sexual indiscretions with this minor age child. The defendant was aware of her age, but continued to take -- have sexual activities with her." The trial court's "ADDITIONAL FINDINGS" attached to the order were:

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2. We also note that the State's investigative file -- which was apparently crucial to the trial court's decision -- is not in the record before us, and defendant raises no argument regarding use of this file.

> 1. The defendant, when he became aware that the victim was under age, continued his sexual activity with her.
>
> 2. At the time of conviction, the defendant had 9 prior record points and was record level IV.
>
> 3. It is reasonable for public safety and justified that the defendant be placed on satellite based monitoring for a period of 5 years.
>
> 4. The defendant is be to given credit toward that 5 year period for any previous time that the defendant has been subject to satellite based monitoring.

None of the additional findings address a *Grady* analysis or issues under the Fourth Amendment, but instead only address the trial court's reasons for requiring SBM as "the highest possible level of supervision and monitoring." Thus, the constitutional issues related to *Grady* were neither raised by defendant *nor* ruled upon by the trial court as defendant contends, so this issue has not been preserved for appellate review.

Defendant's request for review under Rule 2 remains to be considered. Again, *Bursell* is helpful to our analysis. In *Bursell*, this Court determined the *Grady* issue had been implicitly addressed in the trial court and was preserved. ___ N.C. App. at ___, 813 S.E.2d at 466. But the Court also noted that "[a]ssuming, *arguendo*, this objection was inadequate to preserve a constitutional *Grady* challenge for appellate review, in our discretion we would invoke Rule 2 to relax Rule 10's issue-preservation requirement and review its merits." *Id.* at 466–67. The primary reason the *Bursell* Court would have invoked rule 2 was that "the State here concedes reversible error." *Id.* at ___ 813 S.E.2d at 467. Here, the State does not concede error.

In *State v. Bishop*, this Court noted that the defendant's *Grady* argument from his SBM hearing was also not preserved:

> Indeed, Bishop concedes that the argument he seeks to raise is procedurally barred because he failed to raise it in the trial court. We recognize that this Court previously has invoked Rule 2 to permit a defendant to raise an unpreserved argument concerning the reasonableness of satellite-based monitoring. But the Court did so in *Modlin* because, at the time of the hearing in that case, neither party had the benefit of this Court's analysis in *Blue* and *Morris*. In *Blue* and *Morris*, this Court outlined the procedure defendants must follow to preserve a Fourth

> Amendment challenge to satellite-based monitoring in the trial court.
>
> This case is different from *Modlin* because Bishop's satellite-based monitoring hearing occurred several months after this Court issued the opinions in *Blue* and *Morris*. Thus, the law governing preservation of this issue was settled at the time Bishop appeared before the trial court. As a result, the underlying reason for invoking Rule 2 in *Modlin* is inapplicable here and we must ask whether Bishop has shown any other basis for invoking Rule 2.
>
> He has not. Bishop's argument for invoking Rule 2 relies entirely on citation to previous cases such as *Modlin*, where the Court invoked Rule 2 because of circumstances unique to those cases. In the absence of any argument specific to the facts of this case, Bishop is no different from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review.

State v. Bishop, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369–70 (2017) (citations, quotation marks, and brackets omitted), *disc. review denied*, ___ N.C. ___, 811 S.E.2d 159 (2018).

This case differs from other cases in which Rule 2 review has been allowed only in its procedural posture, and that difference does not favor defendant. The law regarding *Grady* was well-established by the time of defendant's bring-back hearing, but he made no constitutional objection. *See generally Grady*, 135 S.Ct. 1368, 191 L. Ed. 2d 459. The State and trial court proceeded with the hearing as directed by this Court in *Lindsey I*. Defendant had the opportunity to raise his constitutional argument, but he did not take it. We decline to exercise our discretion under Rule 2 to consider defendant's constitutional argument. If we allowed review in this case, this would essentially allow defendants to sit silently in the SBM hearing while the State and trial court address the case without knowing what issues defendant may raise on appeal and without giving either the opportunity to address them. Although the State has the burden of proof of reasonableness of SBM under the Fourth Amendment as directed by *Grady*, *see generally Grady*, 135 S.Ct. 1368, 191 L. Ed. 2d 459, the defendant still must raise the constitutional objection so the State will be on notice it must present evidence to meet its burden.

IV. Conclusion

We decline to grant review under Rule 2 to consider defendant's constitutional argument which he waived. As defendant makes no other argument regarding the SBM order, we affirm.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
SYDNEY SHAKUR MERCER, DEFENDANT

No. COA17-1279

Filed 7 August 2018

Criminal Law—jury instructions—requested instruction—justification defense

The trial court erred by denying defendant's request for a jury instruction on justification as a defense to possession of a firearm by a felon where he satisfied each element of the justification defense as set forth in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). In the light most favorable to defendant, the evidence showed that another family approached defendant's family's home seeking a fight; defendant grabbed his cousin's gun only after he heard the other family's guns cocking and witnessed his cousin struggling with his own gun; defendant had tried to calm the situation without violence; and defendant relinquished possession of the gun when he was able to run away from the situation. Furthermore, defendant showed he was prejudiced by this error, as the jury was instructed on self-defense with regard to defendant's assault charges and acquitted him of those charges, and the jury sent the trial court a note asking for clarification as to whether there existed a justification defense for possession of a firearm by a felon.

Appeal by defendant from judgment entered 8 May 2017 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

ZACHARY, Judge.

Defendant Sydney Shakur Mercer was indicted for possession of a firearm by a felon and for two counts of assault with a deadly weapon with the intent to kill. A jury found defendant not guilty on both charges of assault, but guilty of possession of a firearm by a felon. Defendant appeals from judgment entered upon his conviction. On appeal, defendant argues that the trial court erred in denying his request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. After careful review, we conclude that defendant was entitled to an instruction on justification as a defense.

Background

In April 2016, defendant was indicted for possession of a firearm by a felon and two counts of assault with a deadly weapon with the intent to kill. The charges against defendant were joined for trial and came on to be tried before a jury at the 20 March 2017 criminal session of Mecklenburg County Superior Court, the Honorable Jesse B. Caldwell, III presiding.

The charges against defendant arose from an altercation that took place on 30 March 2016 on Peach Park Lane in Charlotte, during which defendant, a convicted felon, possessed a gun. During the events that gave rise to the charges against defendant, defendant resided on Peach Park Lane, near the home of Dazoveen Mingo. On 29 March 2016, Dazoveen was playing basketball in the neighborhood. Defendant's cousin Wardell was also present, and, at some point, Wardell's phone was stolen. He believed that Dazoveen was the culprit and the two nearly fought. The following day, Dazoveen was "walking . . . to the candy man" when he encountered Wardell and an individual he identified as "J." Wardell repeated his previous accusation that Dazoveen had stolen his phone, and a fight occurred. Defendant's mother broke up the fight.

Dazoveen left and notified his brother, Nacharles Bailey, who informed their mother, Dorether Mingo ("Ms. Mingo"). While Dazoveen and Nacharles waited for her to arrive home, Ms. Mingo called her sister, Lina. Ms. Mingo and her other son, Jaquarius, arrived at their home

within approximately five to ten minutes. The Mingos and additional family members then walked over to defendant's home, where Wardell was visiting, with the intention of fighting. At that point, an altercation occurred. The participants and witnesses provided different versions of the event at trial.

I. The State's Evidence

At trial, the State presented evidence tending to show the following: Dazoveen testified that approximately fifteen people walked to defendant's home in order to fight. The only armed person in the Mingo group was Dazoveen's aunt, Lina, who arrived later. Upon their arrival at defendant's home, a black Cadillac pulled into the driveway and defendant, Wardell, and J got out of the car. "When we [were] getting ready to fight," Dazoveen saw that defendant had a handgun "at his belt buckle." Dazoveen did not say anything to defendant, but told Wardell "to come fight [him]." Dazoveen further testified:

> Q. All right. And what, if anything, did you hear anybody else saying to [defendant]?
>
> A. Well, basically my brother and them was telling him to fight. Basically they was telling everybody to fight.
>
> Q. Okay. Which brother was talking to [defendant]?
>
> A. Both of them.

Meanwhile, defendant's mother was attempting to "calm[] down . . . the situation." Dazoveen testified that after defendant showed a gun, "we [were] still trying to fight, and they [were] backing up, and we [were] coming towards them. And that's when [defendant] had shot [the gun] in the air." After defendant fired one shot in the air, Dazoveen's "aunt came running through the path, and then [Ms. Mingo] snatched the gun from her and shot up in the air." Defendant then "shot back into the air[]" and Ms. Mingo shot into the air again. Following these shots, Dazoveen and his relatives returned to the Mingo home, and Dazoveen's aunt called the police. Dazoveen and Ms. Mingo both gave recorded statements at the police station and watched a surveillance video of the altercation which was taken from a nearby home on the same street.

At trial, Dazoveen watched the video and testified that three people had guns during the altercation: defendant, Ms. Mingo, and Dazoveen's brother, Nacharles. He also testified that Nacharles fired his gun, but he could not tell at whom Nacharles was firing. After viewing a video of the statement he gave to police to refresh his recollection, Dazoveen

testified that he told a detective that defendant's mother had broken up the fight between him, Wardell, and J on 29 March 2016, and that both of Dazoveen's brothers, Jaquarious and Nacharles, fired the same gun during the altercation on 30 March 2016.

Ms. Mingo also testified for the State as follows: On 30 March 2016, she received a phone call from her son, Nacharles, in which he informed her that Dazoveen "had been jumped." Her other son, Jaquarious, was with her at the time, and they drove home, during which time she did not make any phone calls. She found that her mother, her sisters, three of her nephews, three of her nieces, and "[her] whole family, pretty much, [were] at the house when [she] pulled up." After seeing her son Dazoveen's injuries from his fight with Wardell and J, she "immediately went to . . . [defendant's] house through the path, there's a path, and as a result of me going, my oldest two went over there to approach [defendant] and the guy J and the guy Wardell." Ms. Mingo's sons were ready to fight and "[she] was not trying to stop [the fight]." Defendant "was the only one that had the gun out," which he had removed from his pants, and he was pointing the gun while saying, "back up, back up."

Her sons "continued to advance on him even though he had [a] gun out[.]" Defendant's mother was "standing in front of him telling him, Sydney, put the gun up, put the gun up." Ms. Mingo testified that by this point, she was screaming, "If you going to shoot, shoot. If you're not, put the gun up." Defendant fired his first shot "over his mom's head" toward Ms. Mingo and her family. Ms. Mingo ran after that first shot and "snatched" her sister's gun from her hand and fired it in the air. She testified that defendant shot toward her "[m]aybe three" times and that she shot toward him "four times, maybe." Nacharles then took the gun from Ms. Mingo, but he did not shoot it because it was empty.

II. Defendant's Evidence

At the conclusion of the State's evidence, defendant presented evidence which tended to show the following: Defendant's mother, Rashieka Mercer ("Ms. Mercer"), testified at trial that, on 30 March 2016, she "heard a bunch of commotion outside" of her house, went outside, and witnessed Wardell and Dazoveen "engaged in a fight." She "told them to stop it, and at that point [Dazoveen] got up and he left" while "screaming out that he was going to get his brothers and they were going to kill [Wardell]." She further testified that no one else was present or involved in the fight other than Dazoveen and Wardell. Later that same day, Ms. Mercer heard another commotion outside of her house, and when she went outside, she "saw a crowd of people basically

ambushing [her] son[.]" Ms. Mercer ran outside and tried to explain that defendant had nothing to do with the earlier fight. At that point, she observed that Nacharles had a gun, "so [she] got in front of [defendant] trying to shield him[.]" Defendant also had a gun. Ms. Mingo "was telling her son [Nacharles] to shoot [defendant]." Nacharles shot his gun, and Ms. Mercer screamed at the crowd about getting defendant out of there because they were trying to kill him. She also witnessed Ms. Mingo "chasing [defendant] and shooting at him."

Defendant testified in his own defense to the following facts: On 30 March 2016, after arriving home from a job interview, defendant encountered a group of approximately fifteen people trying to fight. He knew Nacharles, Jaquarious, and Dazoveen, but did not know the other people. He testified that "[t]he mother of [his] child" was with him in the car. After defendant asked the crowd what was going on, they told him that jumping their little brother was not right, to which defendant responded, "I [didn't] have [anything] to do with it." However, the group kept approaching defendant, stating that they were "done talking." Defendant observed the handles of three handguns in the possession of Jaquarious, Nacharles, and another person he did not know. At that point, Wardell had also pulled a gun out while "talking to them" and "just basically trying to plead our case." Defendant then heard the sound of people cocking their guns, so he asked Wardell to give him the gun, and because "[Wardell] didn't know what he was doing," defendant took the gun from him. Defendant continued trying to plead his case with the group. Defendant was aware that, as a convicted felon, he was not allowed to possess a firearm, but testified that "Wardell [] is my little cousin. So at that time, my mother being out there, . . . I would rather make sure we [are] alive versus my little cousin making sure, who is struggling with the gun." He then pointed the gun at the Mingos and "[kept] telling them to back up" several times. Defendant pointed the gun at Jaquarious because he "ran up on to the side and right beside [defendant's] mother," and then "shots were being fired" by someone else, but defendant could not tell who was firing them. Defendant "turned around to see who shot at Shoe,"[1] and, after telling his mother to move out of the way, he "dashed to the side of the street," and observed that Nacharles was "still shooting at [him], so [defendant] tried to shoot." However, the gun jammed and he threw it to Wardell so "he [could] fix it because it's his gun, and [defendant] just [ran] home." Defendant testified that he "only fired one shot," toward Nacharles "because he was shooting

1. "Shoe" is not mentioned at any other time throughout the trial transcript.

first." Defendant turned himself in to the police early the next morning around midnight.

During the charge conference, defendant made a timely request in writing that the trial court instruct the jury on a justification defense to the charge of possession of a firearm by a felon, which the trial court denied. Defendant objected to the trial court's failure to instruct the jury on justification. During jury deliberations, the jury sent the trial court a note regarding "Justification Defense For Possession of Firearm," in which the jury asked the trial court for "Clarification on whether or not [defendant] can be justified in possession of a firearm even with the stipulation of convicted felon." The trial court responded by "reread[ing] and recharg[ing] its instruction on reasonable doubt and on possession of a firearm by a felon." Defendant was found not guilty of both charges of assault with a deadly weapon with intent to kill and guilty of the charge of possession of a firearm by a convicted felon.

On appeal, defendant asserts that the trial court erred by refusing his request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon.

Standard of Review

It is axiomatic that "the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015) (citations and quotation marks omitted). "[T]he question of whether a defendant is entitled to an instruction on the defense of duress or necessity presents a question of law, and is reviewed *de novo*." *Id.* at 393, 768 S.E.2d at 621. Accordingly, "where the request for a specific instruction raises a question of law, 'the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' " *Id.* (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

We review the evidence in the light most favorable to the defendant. *State v. Monroe*, 233 N.C. App. 563, 567, 756 S.E.2d 376, 379 (2014), *aff'd per curiam*, 367 N.C. 771, 768 S.E.2d 292 (2015) ("[W]e review the evidence in the present case in the light most favorable to [the] [d]efendant, in order to determine whether there is substantial evidence of each element of the defense.").

Discussion

On appeal, defendant argues that the trial court erred by denying his request for an instruction on justification as a defense to the charge of possession of a firearm by a felon. After careful review of the evidence in the light most favorable to defendant, we hold that there was substantial evidence of each element of the justification defense in the present case, and defendant was entitled to have the jury instructed on the defense of justification.

Under North Carolina law, "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in [N.C. Gen. Stat. § 14-288.8(c)]." N.C. Gen. Stat. § 14-415.1(a) (2017). "The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016) (citation omitted); *see also State v. Wood*, 185 N.C. App. 227, 235, 647, S.E.2d 679, 686 (2007).

A justification defense to possession of a firearm by a convicted felon was set forth in *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000). The *Deleveaux* test provides that "a defendant must show four elements to establish justification as a defense" to a charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

State v. Craig, 167 N.C. App. 793, 796, 606 S.E.2d 387, 389 (2005) (quoting *Deleveaux*, 205 F.3d at 1297); *see also United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

This Court has not explicitly adopted the *Deleveaux* test; however, we have consistently "assume[d] *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for possession of a firearm by a felon." *Monroe*, 233 N.C. App. at 569, 756 S.E.2d at 380. In *State v. Monroe*, the defendant was engaged in an "on-going

dispute" with another man, Davis. *Id.* The defendant was at the residence of another individual, Gordon, when Davis arrived in Gordon's front yard and threatened to "turn the heat up on" the defendant. *Id.* at 564, 756 S.E.2d at 377. Evidence was also presented that earlier that day, Davis had barged into a residence in which the defendant was present, and that Davis stated he was "going to stay out here until the door come open" when he arrived at Gordon's residence. *Id.* However, "[t]he uncontroverted evidence at trial showed that [the] [d]efendant was *inside* Gordon's house when [the] [d]efendant took possession of a firearm":

> [The] [d]efendant's subsequent contentions are that Davis "had instigated violence against [the] [d]efendant before," and that remaining inside Gordon's residence would have been "no protection" because Davis had previously "barged in" to a residence where [the] [d]efendant was located. However, the evidence does not compel a conclusion that, while inside the residence, [the] [d]efendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury.
>
> . . .
>
> We thus cannot rely on the mere possibilities that (1) Davis may have been about to enter the residence and (2) that Davis then would have threatened death or serious bodily injury to [the] [d]efendant. [The] [d]efendant has failed to show that he was under "unlawful and present, imminent, and impending threat of death or serious bodily injury" at the time he took possession of the firearm.

Id. at 570, 756 S.E.2d at 381 (quoting *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389) (internal quotation marks omitted).

We further concluded that the "[d]efendant also failed to show that he 'had no reasonable legal alternative to violating the law.' " *Id.* at 571, 756 S.E.2d at 381. "The [d]efendant voluntarily armed himself and then walked to the doorway of the residence. [The] [d]efendant has not shown there was no acceptable legal alternative other than arming himself with a firearm, in violation of N.C. [Gen. Stat.] § 14-415.1, and walking to the doorway of Gordon's house." *Id.* Accordingly, this Court held that the evidence, "even when viewed in the light most favorable to [the] [d]efendant, does not support a conclusion that [the] [d]efendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury." *Id.* at 569, 756 S.E.2d at 380.

This Court has applied the *Deleveaux* test in several other cases as well, although the defendant has never satisfied each of the elements in any of these cases. *See*, *e.g.*, *Edwards*, 239 N.C. App. at 395, 768 S.E.2d at 622 (no evidence of facts in support of any elements of the *Deleveaux* test); *State v. McNeil*, 196 N.C. App. 394, 674 S.E.2d 813 (2009) (possession of firearm while under no present or imminent threat of death or injury); *Craig*, 167 N.C. App. at 797, 606 S.E.2d at 389 (possession of firearm after threat subsided); *State v. Boston*, 165 N.C. App. 214, 598 S.E.2d 163 (2004) (possession of firearm while under no present or imminent threat of death or injury); *State v. Napier*, 149 N.C. App. 462, 560 S.E.2d 867 (2002) (possession of firearm while under no present or imminent threat of death or injury).

The present case is distinguishable from the prior cases in which this Court has applied the *Deleveaux* test. Here, defendant presented evidence that he grabbed the gun only after he heard guns cocking and witnessed his cousin struggling with the gun. In defendant's brief, he addresses each element of the *Deleveaux* test as follows:

> a. [Defendant's] testimony that he only grabbed the gun from Wardell when he heard guns being cocked, and threw it back to Wardell when he was able to run away supported the first element of the defense: That he *only possessed the gun during the time he was under an unlawful and present imminent and impending threat of death or serious bodily injury*;
>
> b. The evidence was uncontroverted that the Mingos came to [defendant's] premises as aggressors, intending to fight, and [defendant's] testimony that when he got out of his car they were already there seeking a fight supported the second element of the defense: That he *did not negligently or recklessly place himself in this situation* where he would be forced to engage in criminal conduct;
>
> c. [Defendant's] testimony that he continually used words, trying to "plead his case," in responding to the aggressors and that he only resorted to grabbing the gun from Wardell when he heard guns being cocked supported the third element of the defense: That he had *no reasonable alternative to violate the law*; and
>
> d. [Defendant's] testimony that he only took possession of the gun when he heard guns being cocked and relinquished possession when he was able to run away

> supported the fourth element of the defense: That there was a *direct causal relationship between the criminal action and the avoidance of the threatened harm*.

We find the facts presented and the application of the evidence to the elements of the *Deleveaux* test convincing.

The State contends that, "even assuming the Court were to apply the *Deleveaux* test, . . . the evidence does not support the third element that . . . defendant had no reasonable legal alternative to violating the law." In advancing this argument, the State asserts that defendant could have left the dangerous scene at his home or called 911, both of which are legal alternatives "to violating the law by taking the gun from his cousin." We disagree. As defendant asserts in his reply brief, "[o]nce guns were cocked, time for the State's two alternative courses of action—calling 911 or running away through the park—had passed."

The determination of whether defendant acted reasonably, in light of the possible legal alternatives, is a question for the jury, after appropriate instruction. *See, e.g.*, *State v. Barrett*, 20 N.C. App. 419, 423, 201 S.E.2d 553, 555-56 (1974) ("The reasonableness of defendant's action and of his belief that force was necessary presents a jury question.") (citation omitted). Accordingly, defendant was entitled to have the jury instructed on justification as a defense to the charge of possession of a firearm by a felon.

Furthermore, we conclude that defendant was prejudiced by this error. Pursuant to N.C. Gen. Stat. § 15A-1443(a), "a defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2017); *see also State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) (finding that the trial court's failure to give defendant's requested instruction was prejudicial under N.C. Gen. Stat. § 15A-1443(a)).

In the present case, it is undisputed that defendant fired one or more shots during the altercation. However, the jury was instructed on self-defense with regard to the assault charges. The jury then acquitted defendant of both charges of assault with a deadly weapon with intent to kill as well as the lesser-included offense of assault with a deadly weapon. In contrast, the jury was not instructed on justification with regard to the charge of possession of a firearm by a felon, and the jury then convicted defendant of that charge. Moreover, during jury deliberations, the jury sent the trial court a note titled "Justification Defense For Possession

of Firearm," in which the jury asked the trial court for "Clarification on whether or not [defendant] can be justified in possession of a firearm even with the stipulation of convicted felon." We conclude that there is a reasonable probability that, had the trial court provided defendant's requested justification instruction to the jury, the jury would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a).

Conclusion

For the reasons stated herein, we conclude that the trial court committed prejudicial error by denying defendant's request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. Accordingly, we hold that defendant is entitled to a new trial.

NEW TRIAL.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
SHENONDOAH PERRY AND EARL LAMONT POWELL, DEFENDANTS

No. COA17-714

Filed 7 August 2018

1. Constitutional Law—in-court testimony—alibi—post-arrest, pre-Miranda silence

In a prosecution for multiple offenses related to a shooting, the trial court did not err in allowing the State to impeach defendant by questioning him on the stand about his post-arrest, pre-*Miranda* silence because his silence was inconsistent with his later alibi testimony that he could not have committed the crimes because he was not present at the shooting, since it would have been natural for defendant to mention the alibi when he was presented with criminal charges after his arrest.

2. Constitutional Law—in-court testimony—alibi—post-arrest, post-Miranda silence—plain error

Where defendant failed to object to the prosecutor's questions regarding his post-arrest, post-*Miranda* silence regarding an alibi in a prosecution for multiple crimes arising from a shooting incident, the admission, although improper, was reviewed for plain error. No

prejudice was shown in light of the ample evidence establishing defendant's guilt.

3. Sentencing—multiple charges for same conduct—conviction with lesser punishment vacated

Defendant's convictions for assault with a deadly weapon and assault on a child, both stemming from the shooting of a gun toward a minor in the back seat of a car, could not both stand; pursuant to N.C.G.S. § 14-33, the conviction for assault on a child was vacated because N.C.G.S. § 14-32 provided harsher punishment for the same conduct—assault with a deadly weapon.

Appeal by Defendants from judgments entered 15 September 2016 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 8 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General Jeremy D. Lindsley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for Defendant Shenondoah Perry.

Glover & Peterson, P.A., by James R. Glover, for Defendant Earl Lamont Powell.

DILLON, Judge.

Defendants Shenondoah Perry and Earl Lamont Powell appeal from judgments entered upon jury verdicts finding them guilty of numerous offenses in connection with a shooting. For the reasons stated below, we vacate Defendant Perry's conviction for assault on a child and otherwise leave the judgments undisturbed.

I. Background

The evidence at trial tended to show that one night in March 2016, Defendants and two other men opened fire at a car occupied by three individuals. Two of the individuals in the car were struck with bullets and were severely injured. The third individual, a child in the back seat, was not struck by a bullet but was injured by broken glass caused by the gunfire.

Defendants were arrested and tried together. Both were convicted by a jury of multiple charges. Both gave timely notice of appeal.

II. Analysis

On appeal, the parties make various arguments, which we address in turn below.

A. *Miranda* Argument

[1] Defendants' first argument pertains to Defendant Perry's in-court testimony regarding his alibi to support his testimony that he was not present during the shooting. Specifically, Defendants contend that the trial court committed reversible error by permitting the prosecutor to question Defendant Perry on cross-examination regarding his silence to the police after his arrest regarding this alibi. N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with a crime has the right to . . . not be compelled to give self-incriminating evidence[.]").

Here, the prosecutor questioned Defendant Perry during cross-examination regarding both his (1) post-arrest, pre-*Miranda* silence, and (2) post-arrest, post-*Miranda* silence.

The following exchange occurred during the State's cross-examination regarding Defendant Perry's silence after his arrest but before he had been informed of his *Miranda* rights:

> [PROSECUTOR]: Now, When you were being processed at the jail, [the officer] was still with you along with some other officers; is that correct?
>
> [DEFENDANT PERRY]: Yes.
>
> [PROSECUTOR]: When did you tell them that you were with Francesca Cooper on the night that you were charged?
>
> [DEFENSE COUNSEL LEWIS]: Objection.
>
> [THE COURT]: Overruled. Go ahead.
>
> . . .
>
> [PROSECUTOR]: When did you tell [the officer] that you didn't do [participate in the shooting] because you were with your baby's mama on the night it happened?
>
> [DEFENDANT PERRY]: I don't recall that.
>
> [PROSECUTOR]: So you didn't tell him?

> [DEFENDANT PERRY]: I don't recall that.
>
> [PROSECUTOR]: Okay, so you didn't tell him that is my question.
>
> [DEFENDANT PERRY]: No.

And the following exchange occurred during cross-examination regarding Defendant Perry's post-arrest, *post-Miranda* silence:

> [PROSECUTOR]: What if anything did you tell the deputies after you were advised of your rights? And it says having these rights in mind, do you wish to answer any questions without hav[ing] a lawyer present and you said yes. What did you tell these officers?
>
> [DEFENDANT PERRY]: I didn't tell them [any]thing.
>
> [PROSECUTOR]: Okay. You never told them a thing?
>
> [DEFENDANT PERRY]: No.

1. Post-arrest, Pre-*Miranda* Silence

Although a defendant's post-arrest, post-*Miranda* warning silence may not be used by the State for any purpose, *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010), a defendant's post-arrest, pre-*Miranda* silence "may be used by the State to impeach a defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." *Id.* Our Supreme Court has instructed that a defendant's silence about an alibi at the time of arrest can constitute an inconsistent statement, and that this silence can be used to impeach a defendant's alibi offered at trial *if it would have been natural for a defendant to mention the alibi at the time of his encounter with the police. State v. Lane*, 301 N.C. 382, 386, 271 S.E.2d 273, 276 (1980).

In the present case, there was evidence which showed as follows: The offenses were perpetrated no more than 72 hours before Defendant Perry was arrested and informed of the charges against him. Defendant Perry knew the victims named in the warrant: he knew one of the victims because she was his ex-girlfriend, and he knew the other victim from hanging out in the same neighborhood. Despite Defendant Perry's familiarity with these two victims and the location where the shooting occurred, he made no statements that he had an alibi to account for his whereabouts during the commission of the crime. When the officer charged Defendant Perry with three counts of attempted murder and three counts of injury to real or personal

property, Defendant Perry failed to mention his alibi when it would have been natural to deny that he would not have attempted to kill his ex-girlfriend, her current partner, and his ex-girlfriend's son.

Based on this evidence, we conclude that Defendant Perry's silence is *inconsistent* with his later alibi testimony presented for the first time during trial. Therefore, the trial court did not err when it allowed the State to impeach Defendant Perry on cross-examination about his failure to say anything about his alibi when the warrants were read to him and *before* he had received Miranda warnings.

2. Post-arrest, Post-*Miranda* silence

[2] We note that while Defendant Perry's counsel objected to the first set of questions regarding Defendant Perry's post-arrest, *pre-Miranda* silence, counsel did not object to the second set of questions regarding Defendant's post-arrest, *post-Miranda* silence. To preserve a question for appellate review, a party must make a timely objection, stating the specific grounds for the ruling sought if the specific grounds are not apparent. *State v. Eason*, 328 N.C. 409,420, 402 S.E.2d.E2d 809, 814 (1991).

In *State v. Moore*, our Supreme Court held that "[i]n criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." *State v. Moore*, 366 N.C. 100, 105-06, 726 S.E.2d 168, 173 (2012). When a defendant fails to object to the admission of testimony at trial, we review only for plain error. N.C. R. App. P. 10(a)(4). Accordingly, we must review any error using the plain error standard of review.

"For unpreserved evidentiary error to be plain error, the defendant has the burden to show that after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (internal marks omitted). The inquiry is whether the defendants have shown on appeal that "the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial . . . [,]" *Moore*, 366 N.C. at 106, 726 S.E.2d at 173, and "absent the error, the jury probably would have returned a different verdict." *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012).

In the present case, the admission of Defendant Perry's silence about an alibi *post-Miranda* warning, although improper, does not amount to plain error for either Defendant. Assuming that the admission of this evidence was error, we cannot say that it is reasonably probable that

there would have been a different outcome had evidence of Defendant Perry's silence not been admitted. "[G]iven the brief, passing nature of the evidence in the context of the entire trial, the evidence is not likely to have 'tilted the scales' in the jury's determination of [Defendants'] guilt or innocence." *Moore*, 366 N.C. at 107, 726 S.E.2d at 174.

Indeed, there was ample evidence establishing Defendants' guilt. For example, one of the victims testified at trial, identifying both Defendants as the two shooters with one hundred percent certainty. Also, this victim testified that he had an altercation earlier in the day with Defendant Powell where Defendant Powell pointed a gun at him. This evidence was sufficient to establish Defendants' guilt such that the improper admission of Defendant Perry's post-*Miranda* silence did not prejudice him in a way that resulted in an unfair trial. Accordingly, Defendants' argument is overruled.[1]

B. Sentencing Error

[3] Defendant Perry was convicted of and sentenced for multiple charges. Two of these convictions were for assault with a deadly weapon under N.C. Gen. Stat. § 14-32 and assault on a child under N.C. Gen. Stat. § 14-33, both for the firing of the gun towards the minor in the back seat of the car.

Defendant Perry argues that his conviction and sentence for the assault on the child must be vacated. The State, however, argues that only the sentence should be vacated, while the conviction should be allowed to stand.

We agree with Defendant Perry. Specifically, Section 14-33 states that a defendant shall be "guilty of" assault on a child "unless" another statute provides harsher punishment for the same conduct. N.C. Gen. Stat. § 14-33 (2015). Here, since Defendant Perry was convicted and sentenced for assault with a deadly weapon under Section 14-32 for his assault on the minor in the back seat and since this conviction carries a harsher punishment than that provided under Section 14-33, Defendant

1. We note Defendant Powell's argument that *he* was prejudiced by the admission of his co-defendant's post-arrest silence. Specifically, Defendant Powell put on evidence at trial that he, too, was somewhere else during the shooting. Defendant Powell contends that the evidence of Defendant Perry's silence not only tended to rebut Defendant Perry's alibi evidence but also his own alibi evidence. We are not persuaded that Defendant Powell suffered prejudice which would warrant a new trial. Indeed, there is no factual link between Defendant Powell's alibi evidence and Defendant Perry's alibi evidence. That is, any destruction of Defendant Perry's alibi evidence by Defendant Perry's silence did not bear on the factual circumstances of Defendant Powell's alibi evidence.

Perry cannot be said to be "guilty of" violating Section 14-33. *See, e.g.*, *State v. Davis*, 364 N.C. 297, 306, 698 S.E.2d 65, 70 (2010) (ordering the "judgments" for the lesser offenses be "vacated"). We, therefore, vacate, Defendant Perry's conviction and sentence for assault on a child, but leave the other convictions and sentences undisturbed.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
ANTWAUN SIMS

No. COA17-45

Filed 7 August 2018

1. Constitutional Law—cruel and unusual punishment—juvenile—life imprisonment without parole—mitigating factors

The sentence of life imprisonment without parole did not violate the Eighth Amendment rights of defendant, who was seventeen and one-half years old at the time he committed the murder, where the trial court complied with the statutory requirements of N.C.G.S. § 15A-1340.19 *et seq*. by conducting a hearing and considering mitigating factors.

2. Sentencing—juvenile—first-degree murder—life imprisonment without parole

The trial court did not abuse its discretion in weighing the mitigating factors when sentencing a juvenile convicted of murder and concluding that life imprisonment without parole was appropriate. Although defendant challenged many of the trial court's findings regarding mitigating factors, the Court of Appeals rejected his challenges and concluded that the trial court's unchallenged evidentiary findings combined with its ultimate findings regarding mitigating factors demonstrated that the trial court's decision was a reasoned one.

Judge STROUD concurring in the result only.

Appeal by defendant from order entered 21 March 2014 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 17 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

BRYANT, Judge.

Where the trial court complied with the statutory requirements in determining that life imprisonment without parole was warranted for defendant, we hold the sentence is not in violation of the Eighth Amendment. Where the trial court properly made ultimate findings of fact on each of the *Miller* factors as set forth in section 15A-1340.19B(c), we hold that the trial court did not abuse its discretion in weighing those factors and concluding that life imprisonment without parole was appropriate in defendant's case.

In the instant case, the trial court incorporated the facts as articulated by this Court in *State v. Sims*, 161 N.C. App. 183, 184–189, 588 S.E.2d 55, 57–60 (2003), into its order from which defendant appeals.[1] The facts are as follows:

> [D]efendant [Antwaun Sims, who was seventeen at the time of the offense,] was with Chad Williams . . . and Chris Bell . . . in Newton Grove, North Carolina on 3 January 2000, when Bell said that the group needed to rob someone to get a car so Bell could leave the state to avoid a probation violation hearing. Defendant agreed to assist Bell. Defendant, Bell, and Williams observed Elleze Kennedy (Ms. Kennedy), an eighty-nine-year old woman, leaving the Hardee's restaurant . . . around 7:00 p.m. Ms. Kennedy got into her Cadillac and drove to her home a few blocks away. Defendant, Bell, and Williams ran after Ms. Kennedy's car . . . until they reached [her] home. Bell approached Ms. Kennedy in her driveway with a BB pistol and demanded Ms. Kennedy's keys. Ms. Kennedy began

1. This Court has previously summarized the facts of this case for defendant's direct appeal in *State v. Sims*, 161 N.C. App. 183, 184–189, 588 S.E.2d 55, 57–60 (2003).

yelling and Bell hit her in the face with the pistol, knocking her to the ground. Bell told defendant and Williams to help him find the keys to Ms. Kennedy's Cadillac. After rifling through Ms. Kennedy's pockets, Williams found the keys on the carport and handed them to defendant who agreed to drive.

Bell told defendant and Williams to move Ms. Kennedy to the back seat of the Cadillac. . . . Ms. Kennedy kept asking Bell where he was taking her. Bell responded by telling her to shut up and striking her in the face several times with the pistol. . . .

After driving, . . . defendant, Bell, and Williams put Ms. Kennedy, who was unconscious at the time, in the trunk of the Cadillac. . . .

. . . .

[Later], Williams told defendant and Bell that he was not going to travel in a stolen car to Florida with an abducted woman in the trunk. . . .

. . . .

Williams asked if they could let her go, but Bell replied, "Man, I ain't trying to leave no witnesses. This lady done seen my face. I ain't trying to leave no witnesses." Bell asked defendant for a lighter to burn Bell's blood-covered jacket. Defendant gave Bell his lighter and Bell set the jacket on fire and threw it into the Cadillac. Bell stayed to watch the fire, but defendant and Williams walked . . . to defendant's brother's house to watch television. . . . The next morning Bell told defendant to go back to the car and confirm that Ms. Kennedy was dead, and that if she was not, defendant should finish burning the Cadillac. Defendant returned and told Bell and Williams that Ms. Kennedy was dead and that all of the windows in the Cadillac were smoked. . . .

. . . .

Ms. Kennedy's Cadillac was found by law enforcement the morning after her abduction. Investigators discovered Ms. Kennedy's body in the trunk. They made castings of footprints found in the area of the abandoned Cadillac. The castings were later compared to, and matched, shoes

> taken from defendant. . . . Investigators recovered a red cloth from the backseat floorboard, which was later identified as the one defendant had used to wipe down the backseat of the Cadillac. Tests of the cloth showed traces of defendant's semen and Ms. Kennedy's blood. Police found two hairs in the backseat area of the Cadillac, one of which was later determined to be defendant's and the other Bell's. Police also matched latent fingerprints found on the Cadillac with prints taken from defendant and Bell.
>
> . . . .
>
> Forensic pathologist Dr. Falpy Carl Barr (Dr. Barr) testified that he conducted Ms. Kennedy's autopsy on 5 January 2000. . . . Dr. Barr testified that Ms. Kennedy was struck multiple times with a weapon, leaving marks consistent with a pellet gun . . . . Dr. Barr testified that because of the extent of the soot in her trachea and lungs he believed that she was alive and breathing at the time the fire took place in the vehicle; however, because of Ms. Kennedy's elevated carbon monoxide level, Dr. Barr came to the conclusion that Ms. Kennedy died as a result of carbon monoxide poisoning from a fire in the Cadillac.

Id.

Defendant was arrested and later indicted for first-degree murder, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and burning personal property. On 14 August 2001, defendant was tried capitally in the Criminal Session of Onslow County Superior Court, the Honorable Jay Hockenbury, Judge presiding.[2] Defendant was convicted of first-degree murder, first-degree kidnapping, and burning of personal property. At his sentencing hearing, the jury unanimously recommended that defendant be sentenced to life imprisonment without parole, as opposed to death, and the trial court entered judgment. Defendant appealed to this Court, which found no error in defendant's conviction.

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2. Defendant was tried with Bell and Williams as co-defendants. Williams entered a guilty plea to first-degree murder, first-degree kidnapping, burning personal property, and assault with a deadly weapon inflicting serious injury for his role in Ms. Kennedy's death and testified at trial against defendant and Bell. Williams and defendant were sentenced to life without parole. Bell was sentenced to death upon the jury's recommendation.

On 4 April 2013, defendant filed a motion for appropriate relief requesting a new sentencing hearing in light of the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), which held that mandatory life without parole for juvenile offenders violates the Eighth Amendment's prohibition of cruel and unusual punishment. By order entered 2 July 2013, the trial court granted defendant's motion for appropriate relief and ordered a rehearing pursuant to *Miller* as well as our North Carolina General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19B, 2012 N.C. Sess. Laws 2012-148, § 1, eff. July 12, 2012 (stating that a defendant who is less than eighteen years of age who is convicted of first-degree murder pursuant to premeditation and deliberation shall have a hearing to determine whether the defendant should be sentenced to life imprisonment without parole or life imprisonment with parole).

On 20 February 2014, the Honorable Jack Jenkins, Special Superior Court Judge, conducted a hearing and ordered that "defendant's sentence is to remain life without parole." Defendant appealed. On 28 September 2016, this Court issued a writ of certiorari for the purpose of reviewing the resentencing order.

On appeal, defendant contends the trial court (I) violated his Eighth Amendment constitutional protection against cruel and unusual punishment by imposing a sentence of life without parole; and (II) erred by imposing a sentence of life without parole because the trial court failed to make findings on the presence or absence of *Miller* factors and the findings it did make do not support the conclusion that the sentence was warranted.

I

[1] Defendant first argues the trial court violated his constitutional protections against cruel and unusual punishment by imposing a sentence of life without parole. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). The prohibition of cruel and unusual punishment under the Eighth Amendment forbids entering sentences "that are grossly disproportionate to the crime." *State v. Thomsen*, 242 N.C. App. 475, 487, 776 S.E.2d 41, 49 (2015), *aff'd*, 369 N.C. 22, 789 S.E.2d 639 (2016) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 959, 115 L. Ed. 2d 836 (1991). The jurisprudence of the Eighth Amendment as it applies to

juveniles recognizes that juvenile offenders are categorically distinguishable from adult offenders because of their "diminished culpability and greater prospects for reform." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418. Nevertheless, courts continue to balance their interests in enforcing suitable punishments for juveniles proportionate to the crime while also maintaining fairness to juvenile offenders.

Miller v. Alabama "drew a line between children whose crimes reflect[ed] transient immaturity and those rare children whose crimes reflect[ed] irreparable corruption." *Montgomery v. Louisiana*, 577 U.S. ___, ____, 193 L. Ed. 2d 599, 620 (2016), (*as revised* Jan. 27, 2016). The United States Supreme Court ruled that imposing a *mandatory* life sentence without the possibility of parole for juvenile offenders violates the Eighth Amendment and "a judge or jury must have the opportunity to consider mitigating circumstances." *Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430; *also see id.* at 476, 183 L. Ed. 2d at 422 ("Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.")

In response to *Miller* (but prior to the U.S. Supreme Court's decision in *Montgomery* in 2016), our General Assembly enacted N.C. Gen. Stat. §§ 15A-1476 *et seq.*—now codified as 15A-1340.19 *et seq*. Section 15A-1340.19B(a)(1) provides that if a defendant is convicted of first-degree murder solely on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C.G.S. § 15A-1340.19B(a)(1) (2017). If a defendant is not sentenced pursuant to subsection (a)(1), "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C.G.S. § 15A-1340.19B(a)(2) (2017). Section 15A-1340.19C requires the sentencing court to consider mitigating factors in determining whether a defendant will be sentenced to life without the possibility of parole or life with the possibility of parole and to include in its order "findings on the absence or presence of any mitigating factors . . . ." N.C.G.S. § 15A-1340.19C(a) (2017). Therefore, the statutory scheme does not allow for mandatory sentences of life without parole for juvenile offenders and, thus, on its face, is not in violation of the Eighth Amendment per *Miller*.[3]

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3. We note our Supreme Court's recent opinion in *State v. James* held that "the relevant statutory language [in N.C.G.S. § 15A-1340.19C(a)] treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options [to be made based on analyzing] all of the relevant facts and circumstances in

Nevertheless, defendant contends the evidence establishes that he is not one of the rare juveniles who is "permanent[ly] incorrigib[le]" or "irreparabl[y] corrupt[]" and warrants a life sentence without parole as noted in *Montgomery*. Instead, defendant insists that the evidence indicates that at the time of the murder, his intellectual difficulties, developmental challenges, susceptibility to peer pressure, and potential for rehabilitation support a sentence of life in prison with the possibility of parole. Based on the foregoing reasons, and the analysis which follows, we overrule defendant's Eighth Amendment argument. We review the trial court's balancing of the *Miller* factors in Issue II.

II

[2] Defendant next argues the trial court erred by imposing a sentence of life without parole because the trial court failed to make findings on the presence or absence of *Miller* factors and the findings it did make were either contradicted by the evidence or did not support the conclusion that the sentence was warranted. Specifically, defendant challenges six out of the court's nine findings of fact alleging flawed reasoning, and further argues that the trial court failed to establish which factors were mitigating. We disagree.

When an order entered pursuant to N.C.G.S. § 15A-1340.19A *et seq*. is appealed, this Court reviews "each challenged finding of fact to see if it is supported by competent evidence and, if so, such findings of fact are 'conclusive on appeal.' " *State v. Lovette*, 233 N.C. App. 706, 717, 758 S.E.2d 399, 407 (2014). The trial court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion. *State v. Antone*, 240 N.C. App. 408, 410, 770 S.E.2d 128, 129 (2015). "It is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Lovette*, 233 N.C. App. at 721, 758 S.E.2d at 410.

Our General Statutes, section 15A-1340.19B(c) sets forth factors a defendant may submit in consideration for a lesser sentence of life with parole. Those factors include: "1) age at the time of offense, 2) immaturity, 3) ability to appreciate the risks and consequences of the conduct, 4) intellectual capacity, 5) prior record, 6) mental health, 7) familial or peer pressure exerted upon the defendant, 8) likelihood that the defendant

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light of the substantive standard enunciated in *Miller*." *State v. James*, ___ N.C. ___, ___, 813 S.E.2d 195, 204 (2018), *aff'd*, ___ N.C. App. ___, 786 S.E.2d 73 (2016), *disc. review allowed*, 369 N.C. 537, 796 S.E.2d 789 (2017). *But see id.* at ___, 813 S.E.2d at 212 (Beasley, J., dissenting) ("A presumptive sentence of life without parole for juveniles sentenced under this statute contradicts *Miller*.").

would benefit from rehabilitation in confinement, and 9) any other mitigating factor or circumstance." N.C.G.S. § 15A-1340.19B(c). We refer to these as the *Miller* factors.

Here, defendant argues the trial court did not establish which factors were mitigating and imposed a sentence that was not supported by the evidence. The State, on the other hand, asserts the trial court made evidentiary findings on the presence or absence of *Miller* factors, and made explicit (or ultimate findings) on whether it found the factors to be mitigating. The trial court's evidentiary findings of fact (which defendant does not challenge and are therefore binding on appeal, *see In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008)) are, in relevant part, as follows:

> 1. The Court finds as the facts of the murder the facts as stated in *State v. Sims*, 161 N.C. App. 183[, 588 S.E.2d 55] (2003).
>
> 2. The Court finds that the murder in this case was a brutal murder. The Court finds instructive the trial/sentencing jury's finding beyond a reasonable doubt that the murder was "especially heinous, atrocious, or cruel" pursuant to N.C.G.S. 15A-2000(e)(9). According to the trial testimony from Dr. Carl Barr, Ms. Kennedy had blunt force trauma all over her body. . . . Soot had penetrated deep into her lungs, meaning that she was alive when her car was set on fire with her in it, and she therefore died from suffocation from carbon monoxide poisoning.
>
> 3. The Court finds that the defendant has not been a model prisoner while in prison. His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison.
>
> 4. The Court finds that the defendant, although expressing remorse during the hearing, has not demonstrated remorse based on his actions and statements. During a meeting with a prison psychiatrist on January 20, 2009, the defendant complained that he was in prison and should not be. . . .
>
> 5. The Court finds that Dr. Tom Harbin testified that the defendant knew right from wrong. Further, Dr. Harbin testified that the defendant would have known that the

acts constituting the kidnapping [and the] murder were clearly wrong.

6. The Court finds that Dr. Harbin testified that the defendant was a follower, and was easily influenced. Dr. Harbin testified that the defendant may not see himself as responsible for an act if he himself did not actually perform the act even if he helped in the performance of the act. Further, Dr. Harbin testified that the defendant has a harder time paying attention than others and a harder time restraining himself than others. Dr. Harbin testified that the defendant had poor social skills, very poor judgment, would be easily distracted and would be less focused than others. Further, the defendant has a hard time interacting with others and finds it harder to engage others and predict what others might do.

7. The Court finds that while this evidence was presented by the defendant to try to mitigate his actions on the night Ms. Kennedy was murdered, that this evidence also demonstrates that the defendant is dangerous. Dr. Harbin acknowledge [sic] on cross-examination that all of the mental health issues he identified in the defendant, taken as a whole, could make him dangerous.

8. The Court finds that the defendant was an instrumental part of Ms. Kennedy's murder. She died from carbon monoxide poisoning from inhaling carbon monoxide while in the trunk of her car when her car was on fire. According to witness testimony at the trial, the defendant provided the lighter that Chris Bell used to light the jacket on fire that was thrown in Ms. Kennedy's car and eventually caused her death.

9. The Court finds that the evidence at trial clearly demonstrated that the defendant did numerous things to try to hide or destroy the evidence that would point to the defendant's guilt. The most obvious part is his participation in killing Ms. Kennedy, the ultimate piece of evidence against the defendants. Additionally, this defendant was the one who drove the car to its isolated last resting place in an attempt to hide it, even asking his co-defendants if he had hidden it well enough. Further, he personally went back

> to the car the morning after the night it was set on fire to make sure Ms. Kennedy was dead.
>
> 10. The Court finds that the physical evidence demonstrated not only his guilt, but specifically demonstrated the integral role the defendant played in Ms. Kennedy's death. Fingerprints, DNA, and footwear impressions at the scene where Ms. Kennedy was burned alive in her car all matched the defendant. Most notably, Ms. Kennedy died in the trunk of her car, and the palmprint on the trunk of the car, the only print found on the trunk, matched the defendant.

With regard to the trial court's ultimate findings of fact on each of the nine *Miller* factors, defendant challenges all but one (Finding of Fact No. 9) for either failing to establish which factors were mitigating, or as contradicted by the evidence or not supporting the conclusion that a sentence of life without parole was warranted. We address defendant's challenge to each ultimate finding in turn.

A. Finding of Fact No. 1—Age

> 1. Age. The Court finds that the defendant was 17 and ½ at the time of this murder, and therefore his age is less of a mitigating factor that [sic] it would be were he not so close to the age of criminal responsibility. Further, considering *Miller v. Alabama* to be instructive as to this factor, the Court notes that the two defendants in Miller, Jackson and Miller, were 14 at the time that each committed the murder for which he was convicted. Defendant Jackson was convicted solely on a felony murder theory and his initial role in the murder was as a getaway driver, and he was not the one who shot the victim. Defendant Miller had a very troubled childhood which included time in foster care and multiple suicide attempts. Miller killed a drug dealer that apparently provided drugs to Miller's mother and the killing occurred after a physical altercation with the victim. *The Court finds that the defendant's age is not a considerable mitigating factor in this case.*

(emphasis added).

Defendant challenges Finding of Fact No. 1 based on the assertion that "despite his chronological age, [defendant] was actually much younger in other respects on the offense date for this case."

First, it is undisputed that defendant was seventeen-and-a-half years old when he and his two codefendants murdered Ms. Kennedy. Second, there is no indication that the legislature, in enacting N.C.G.S. § 15A-1340.19C(a), intended for the trial court to consider anything other than a defendant's chronological age with regard to this factor. Indeed, the trial court is to consider whether a defendant's age is a mitigating circumstance in light of all the circumstances of the offense and the particular circumstances of the defendant. *See id.* In the instant case, the trial court made a point of drawing a comparison between the ages of the defendants in *Miller*, who were fourteen years old at the time of their crimes, and defendant in this case, who was six months away from reaching the age of majority. In so doing, the trial court properly found that age was not a considerable mitigating factor in this case.

B. Finding of Fact No. 2—Immaturity

> 2. Immaturity. *The Court does not find this factor to be a significant mitigating factor in this case based on all the evidence presented.* The Court notes that any juvenile by definition is going to be immature, but that there was no evidence of any specific immaturity that mitigates the defendant's conduct in this case.

(emphasis added).

Defendant contends this finding is not supported by the evidence because the trial court ignored testimony from Dr. Harbin that defendant and his brother frequently had no adult supervision and raised themselves, defendant was "poorly developed," defendant's stress tolerance and coping skills were immature, and defendant had the psychological maturity of an eight to ten year old.

Contrary to defendant's assertions, the trial court made two evidentiary findings of fact—Nos. 6 and 7—which clearly show that it considered Dr. Harbin's testimony. As stated previously, defendant has not challenged the evidentiary findings of fact and so they are binding on appeal. *See In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. Instead of finding that any evidence of immaturity mitigated defendant's actions, the trial court weighed the evidence and found more compelling Dr. Harbin's acknowledgment that certain characteristics—defendant's "poor social skills, very poor judgment," and difficulty "interacting with others and find[ing] it harder to engage others and predict what they might do"—"could make [defendant] dangerous." It is well within the trial court's discretion to "pass upon the credibility of [certain] evidence and to decide what[, or how much,] weight to assign to it."

State v. Villeda, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004). Accordingly, defendant's argument that Finding of Fact No. 2 is not supported by the evidence is overruled.

C. Finding of Fact No. 3—Ability to appreciate the risks of the conduct

> 3. Ability to appreciate the risks of the conduct. Dr. Harbin, the defendant's psychologist, testified that in spite of the defendant's diagnoses and mental health issues, the defendant would have known that the acts he and his co-defendants committed while they stole Ms. Kennedy's car, kidnapped her, and ultimately murdered her were wrong.

Defendant contends the trial court misapprehended the nature of this finding under section 15A-1340.19B(c)(3) because the question of whether defendant knew an act was wrong is part of the test for the defense of insanity.

In the trial court's unchallenged evidentiary Findings of Fact Nos. 5 and 9, the trial court found that defendant knew right from wrong as evidenced by the fact that defendant did numerous acts to attempt to hide or destroy evidence which would inculpate him in the killing of Ms. Kennedy, including the act of her murder itself, driving the vehicle to its last resting place, asking his codefendants if he hid the vehicle well enough, and personally checking to confirm that Ms. Kennedy was dead. By arguing that Dr. Harbin testified that defendant's intellectual abilities were deficient and that he had poor judgment, defendant essentially requests that this Court reweigh the evidence which the trial court was not required to find compelling. *See State v. Golphin*, 352 N.C. 364, 484, 533 S.E.2d 168, 245 (2000) ("The evidence presented by [the defendant's] mental health expert was not so manifestly credible that . . . [the fact finder] was required to find it convincing."). Accordingly, the trial court did not misapprehend the nature of the factor in section 15A-1340.19B(c)(3) on whether defendant had the ability to appreciate the risks or consequences of his conduct, and this argument is overruled.

D. Finding of Fact No. 4—Intellectual Capacity

> 4. Intellectual Capacity. The Court finds that the defendant's intellectual capacity was below normal. Nevertheless, the Court finds that at the time of Ms. Kennedy's murder, the defendant was able to drive a car, to work at Hardee's, to be sophisticated enough to try to hide evidence in multiple ways at multiple places, and to work

> with his co-defendants to hide evidence and to try to hide Ms. Kennedy's car so it would not be found.

Defendant challenges this finding as "violat[ing] the statutory mandate requiring findings of the absence or presence of mitigating factors." However, the trial court's use of the word "nevertheless" demonstrates that it did not consider this factor to be a mitigating one. In other words, Finding of Fact No. 4 can be read to say that while defendant's intellectual capacity was below normal, it was not a mitigating factor in light of other evidence (defendant's ability to drive a car, work at Hardee's, etc.). As such, this finding does not "violate the statutory mandate," and this argument is overruled.

E. Finding of Fact No. 5—Prior Record

> 5. Prior Record. The defendant's formal criminal record as found on the defendant's prior record level worksheet was for possession of drug paraphernalia. However, the Court notes that because the defendant was 17 ½, he had only been an adult for criminal purposes in North Carolina courts for a short period of time. The Court considers the defendant's Armed Robbery juvenile situation in Florida and the defendant's removal from high school for stealing as probative evidence in this case, specifically because both occurrences occurred when the defendant was with others, and the defendant denied culpability in Ms. Kennedy's murder and the other two incidents. *The Court does not find this to be a compelling mitigating factor for the defendant.*

(emphasis added).

Defendant argues the trial court misapprehended this factor because it considered an armed robbery charge from Florida and defendant's expulsion from high school for stealing. He contends this mitigating factor only encompasses a defendant's formal criminal record, which showed a single conviction for possession of drug paraphernalia.

First, the statute at issue, N.C.G.S. § 15A-1340.19B, does not define the term "prior record." *See id.* § 15A-1340.19B(c). Second, in its unchallenged evidentiary Finding of Fact No. 4, the trial court found, in relevant part, as follows with regard to defendant's prior record:

> [T]he Court reviewed materials and heard evidence that as a juvenile in Florida, the defendant had been charged with armed robbery but denied any culpability in the case. Also,

> this Court heard and reviewed evidence that the defendant was removed from Hobbton High School in September 1998 in large part due to bad behavior. Specifically, the Court notes that the defendant was accused, along with two others, of stealing from the boy's locker room after school as a part of a group, but again denied doing anything wrong. The school specifically found that [defendant's] acts during this theft were not due to his learning disabilities. This Court notes in all three incidents, the Florida armed robbery, the Hobbton high school theft, and the murder of Ms. Kennedy, the defendant was with a group of people, and in the light most favorable to him, was at a minimum a criminally culpable member of the group but was unwilling to admit to any personal wrongdoing.

(footnote omitted). Further, in a footnote to unchallenged evidentiary Finding of Fact No. 4, the trial court stated as follows:

> According to the defendant's evidence, the defendant was charged in juvenile court in Florida and was placed on juvenile probation as a result of this incident. Further, the defendant's version of this incident is that after being placed on probation, the charges were eventually dismissed. This Court does not specifically consider the charge itself or the subsequent punishment itself as evidence against the defendant, but rather finds noteworthy the defendant's complete denial of any wrongdoing while involved in criminal activity as part of a group. The Court notes the similarity to that incident and this incident, in which the defendant, while part of a group, committed acts that a Court deemed worthy of punishment, but for which the defendant denied wrongdoing.

By making clear that it was not "specifically consider[ing] the charge itself," the trial court nevertheless did not misapprehend the nature of this mitigating factor as there is no prohibition, statutory or otherwise, on a trial court taking into consideration school records which indicate a defendant has previously engaged in criminal activity simply because such evidence is not a part of a defendant's "formal criminal record." Indeed, evidence of defendant's conviction for possession of drug paraphernalia, followed by theft, followed by the murder of Ms. Kennedy shows the escalation of defendant's criminal activity, which is an appropriate consideration for the trial court. *See Lovette*, 233 N.C. App. at 722, 758 S.E.2d at 410 (finding no error in the trial court's conclusion

to sentence the defendant to life imprisonment without parole where, *inter alia*, the defendant's "criminal activity had continued to escalate"). Defendant's argument is overruled.

F. Finding of Fact No. 6—Mental Health

> 6. Mental Health. Dr. Harbin testified both at trial and at the February 20, 2014 evidentiary hearing that he diagnosed the defendant with ADHD and a Personality Disorder Not Otherwise Specified. The Court finds that although the defendant did have mental health issues around the time of the murder, *they do not rise to the level to provide much mitigation*. Many people have ADHD, and a non-specified personality disorder is not an unusual diagnosis. Many people function fine in society with these issues.

(emphasis added).

Defendant challenges this finding as failing to provide a clear indication of whether it was mitigating or not, depriving this Court of the ability to effectively review the sentencing order. Contrary to defendant's assertion, the trial court clearly stated in Finding of Fact No. 6 that it found "that although the defendant did have mental health issues around the time of the murder, they do not rise to the level to provide much mitigation." In other words, the trial court did not find defendant's mental health at the time to be a mitigating factor. Defendant's argument is overruled.

G. Finding of Fact No. 7—Familiar or Peer Pressure exerted on the defendant

> 7. Familiar of Peer Pressure exerted on the defendant.
>
> A. The Court finds there was no familial pressure exerted on the defendant to commit this crime. In fact, the opposite is true. Sophia Strickland, [defendant's] mother, testified both at the trial and at the February 20, 2014 evidentiary hearing that she had warned [defendant] repeatedly to stay away from the co-defendant's [sic] in this case. Specifically, Ms. Strickland stated at the evidentiary hearing that if [defendant] continued to hang out with his co-defendants, something bad was going to happen. Further, [defendant's] sister, Tashia Strickland, also told [defendant] that she did not like the co-defendants, that the co-defendants were not

> welcome at her residence, and that [defendant] should not hang out with them. Also, Vicki Krch, [defendant's] Hardee's manager, who tried to help [defendant] when she could, sometimes gave [defendant] a free ride to work, bought [defendant] a coat, and fed [defendant's] younger brother for free, warned [defendant] not to hang out with the co-defendants, one of whom had worked for her and she knew well. The Court finds that the defendant refused to listen to his family members' warnings to stay away from the co-defendants.
>
> B. Peer Pressure. There was no evidence in this case that [defendant] was threatened or coerced to do any of the things he did during the kidnapping, assault, murder, and burning of Ms. Kennedy's car. At trial, co-defendant Chad Williams stated that when Chris Bell first brought up the idea of stealing the car, [defendant] stated "I'm down for whatever." The only evidence that may fit in this category is Dr. Harbin's testimony that the defendant could be easily influenced. Nevertheless, the defendant made a choice to be with his co-defendants during Ms. Kennedy's murder, and actively participated in it. The evidence demonstrated that the defendant was apparently only easily influenced by his friends, but not his family who consistently told him to avoid the co-defendants. This demonstrates that the defendant made choices as to whom he would listen.

(footnote omitted).

Defendant argues that both parts of this finding demonstrate that the trial court misapprehended the "peer pressure" mitigating factor. He contends there is no requirement that a defendant demonstrate actual threats or coercion to prove he was subject to peer pressure and that his refusal to listen to his mother after he started hanging out with his codefendant, Bell, was consistent with the existence of peer pressure.

Reading Finding of Fact No. 7 as a whole, it shows that the trial court found that there was little or no pressure exerted by defendant's codefendants to participate in these crimes. The trial court found that when Bell brought up the idea of stealing a vehicle, defendant stated, "I'm down for whatever." It further found that the only evidence that could possibly relate to defendant's susceptibility to familial or peer

pressure was Dr. Harbin's testimony that defendant could be easily influenced. However, the trial court nevertheless found that defendant made a deliberate choice to be with his codefendants and "actively participated" in the murder, even that he played an "integral role" in the crime. As for defendant's contention that his refusal to listen to his family members' warnings to stay away from his codefendants is evidence that he was subject to peer pressure, that contention is not supported by the trial court's findings. The trial court found, rather, that this was evidence that he was "apparently only easily influenced by his friends, but not his family . . . [which] demonstrates that [he] made choices as to whom he would listen." Defendant's argument is overruled.

H. Finding of Fact No. 8—Likelihood the defendant would benefit from rehabilitation in confinement

> 8. Likelihood the defendant would benefit from rehabilitation in confinement. The defendant's prison records demonstrate that the defendant has been charged and found responsible for well over 20 infractions while in prison. He consistently refused many efforts to obtain substance abuse treatment. While the defendant has in fact obtained his GED which the court finds is an important step towards rehabilitation, the Court notes that the defendant during the first ten years plus of his confinement often refused multiple case managers [sic] pleas to obtain his G.E.D. According to prison records submitted into evidence during the February 20, 2014 evidentiary hearing, the Court notes that during a 2009 meeting with a psychiatrist the defendant noted that he was depressed in part because he was in prison and should not be. The Court finds that throughout the defendant's life he did not adjust well to whatever environment he was in. The Court finds that in recent years, the defendant has seemed to do somewhat better in prison, which includes being moved to medium custody. Most importantly to this Court, the evidence demonstrates that in prison, the defendant is in a rigid, structured environment, which best serves to help him with his mental health issues, and serves to protect the public from the defendant, who on multiple occasions in non-structured environments committed unlawful acts when in the company of others.

(footnote omitted).

Defendant argues that in making Finding of Fact No. 8, the trial court improperly used his improvement while in prison against him. Contrary to defendant's assertion, Finding of Fact No. 8 indicates that defendant has not benefitted a great deal from rehabilitation during his confinement, which is supported by the trial court's unchallenged evidentiary Finding of Fact No. 3: "The Court finds that the defendant has not been a model prisoner . . . . His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison." While the trial court did note that defendant "seemed to do somewhat better in prison" in recent years, it also noted that defendant's own expert testified that his mental health issues made him dangerous and that he would do best in a rigid, structured environment like prison. Accordingly, the trial court's Finding of Fact No. 8 was supported by the evidence and not used improperly against defendant. This argument is overruled.

While *Miller* states that life without parole would be an uncommon punishment for juvenile offenders, the trial court has apparently determined that defendant is one of those "rare juvenile offenders" for whom it is appropriate. *See Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424. The trial court's unchallenged evidentiary findings combined with its ultimate findings regarding the *Miller* factors demonstrate that the trial court's determination was the result of a reasoned decision.[4] Therefore, the trial court did not abuse its discretion in weighing the Miller factors to determine defendant's sentence.

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4. Following the *Miller* ruling, many courts adopted their own interpretation of *Miller*'s application to current legislation and state practices, as it varies by jurisdictions. More recently, in *Malvo v. Mathena*, 893 F. 3d 265, 274 (4th Cir. 2018), *aff'd*, *Malvo v. Mathena*, 254 F. Supp. 3d 820 (E.D. Va. 2017), the Fourth Circuit's opinion defined *Miller* to prohibit "impos[ing] a discretionary life [] without [] parole sentence on a juvenile homicide offender *without first concluding* that the offender's 'crimes reflect permanent incorrigibility,' as distinct from the 'transient immaturity of youth.' " *Id.* (quoting *Montgomery*, 577 U.S. at ____, 193 L. Ed. 2d at 620) (emphasis added)).

We rely on our precedent–which *Montgomery* reiterates–that sentencing judges *may* consider *Miller* factors but are not *required by law* to issue an ultimate finding or conclusion. *See Lovette*, 233 N.C. App. at 719, 758 S.E.2d at 408 ("The findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of 'irreparable corruption' is not required."); *see also Montgomery*, 577 U.S. at ____, 193 L. Ed. 2d at 621 ("*Miller* [does] not require trial courts to make a finding of fact regarding a child's incorrigibility. . . this Court is careful [not] to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). We reject the contention that the trial court was erroneous because it did not issue a finding regarding permanent incorrigibility.

NO ERROR.

Judge CALABRIA concurs.

Judge STROUD concurs in the result only by separate opinion.

STROUD, Judge, concurring.

I concur in the result only, reluctantly, because prior precedent of this Court requires it.

Our trial courts and this Court have struggled with the proper application of the *Miller* factors in first degree murder convictions of defendants under 18 at the time of the crime. *See generally Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012). The application of the *Miller* factors is a discretionary ruling and has no hard and fast rules, nor should it. *See generally id.* But the United States Supreme Court's ruling in *Montgomery v. Louisiana* establishes that the trial court must be able to find that the defendant is "permanent[ly] incorrigibl[e]" or "irreparab[ly] corrupt[]" before sentencing him to life imprisonment without the possibility of parole. 577 U.S. ___, ___, 193 L. Ed. 2d 599, 611-20 (2016). "Permanent" means forever. "Irreparable" means beyond improvement. In other words, the trial court should be satisfied that in 25 years, in 35 years, in 55 years — when the defendant may be in his seventies or eighties -- he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate. That is a very high standard, which is why the Supreme Court stated that life imprisonment without the possibility of parole should be "rare[.]" *Id.* at ___, 193 L.E. 2d at 611.

If our courts consistently interpret evidence of each factor as "not mitigating" no matter what the evidence is -- and they are free to do so, as I noted in my concurring opinion in *State v. May*, ___ N.C. App. ___, 804 S.E.2d 584 (2017) -- defense attorneys will have no way of knowing what sort of evidence to present in mitigation. For example, a low IQ can be seen as mitigating, since it lessens the defendant's culpability; it can also be seen as not mitigating, because the defendant may be less able to take advantage of programs in prison which may improve him, such as obtaining a GED. Here, the trial court even noted in finding of fact seven that although defendant presented certain evidence intended as mitigating evidence, it found the evidence to be the opposite. Defense attorneys may damage a defendant's case when trying to help it, since any evidence they use can be turned against them. But the trial court's

opinion addressed each factor as required by North Carolina General Statute § 15A-1340.19B, and though I agree with defendant that the trial court focused more on whether he is "dangerous" than permanently incorrigible or irreparably corrupt, under North Carolina's case law, that is within its discretion.

I therefore concur in result only.

STATE OF NORTH CAROLINA
v.
JEFFERY DANIEL WAYCASTER

No. COA17-1249

Filed 7 August 2018

1. Evidence—hearsay—exceptions—business records—GPS tracking reports

The trial court did not err by admitting hearsay evidence under the business records exception to establish that an ankle monitor found in a ditch was the monitor assigned to defendant as a condition of his probation. A probation officer laid a proper foundation by describing the operation of the monitor, demonstrating his familiarity with the monitoring system, and explaining how the tracking information is transmitted to and stored in a database used by the probation office.

2. Sentencing—habitual felon status—proof of prior convictions—evidentiary requirements—ACIS printout

A printout from the Automated Criminal/Infraction System (ACIS) was admissible to prove a prior felony to establish defendant's habitual felon status and was not barred by the best evidence rule. The ACIS printout was a true copy of the original record, certified by a clerk of court at trial, and met the evidentiary requirements of N.C.G.S. § 14-7.4.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from judgments entered 16 May 2017 by Judge Gary M. Gavenus in McDowell County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander Walton, for the State.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum for defendant-appellant.

ARROWOOD, Judge.

Jeffery Daniel Waycaster ("defendant") appeals from judgments entered on his convictions of interfering with an electronic monitoring device and attaining the status of a habitual felon.

I. Background

On 26 October 2015, defendant was indicted for interfering with an electronic monitoring device, and for attaining the status of a habitual felon. The matter came on for trial in McDowell County Superior Court before Judge Gary M. Gavenus on 15 May 2017. The State's evidence tended to show that, on 24 September 2015, defendant was subject to supervised probation due to a conviction for felony larceny that was entered 22 July 2014. As a modified condition of his probation, defendant submitted to electronic monitoring.

Probation Officer Matthew Plaster ("Officer Plaster") supervised defendant. Officer Plaster testified that defendant's electronic monitoring equipment was installed prior to 24 September 2015 by BI Total Monitoring, the company contracted to install and monitor the equipment. Officer Plaster described the equipment as follows. BI Total Monitoring's electronic monitoring equipment includes an ankle monitor, a beacon that used a global positioning system ("GPS") to track the monitor, and a charger for each probationer. The ankle monitor and beacon "have serial numbers on them that are specific to" the probationer they monitor. BI Total Monitoring's computer software, BI Total Access, keeps logs of which serial numbers are assigned to each probationer.

When an ankle monitor is not in the beacon's range, it transmits a GPS signal. These signals enable the probation officer to log onto a computer program to see, "within a fairly accurate distance[,]" where a probationer is located. When a probationer removes the ankle monitor, BI Total Monitoring notifies the probation office. Officer Plaster testified that this technology "works really well" and their office has "not had much issue with dead spots and stuff." After the equipment's installation on defendant's person and at his residence, Officer Plaster inspected it to ensure "it was on properly."

On 24 September 2015, the "on call" probation officer, Probation Officer David Ashe ("Officer Ashe"), received an alert from BI Total Monitoring that defendant's ankle monitor's strap had been tampered with. Unable to reach defendant by phone, Officer Ashe used the GPS to locate the monitor miles from defendant's residence, in a ditch approximately 8 feet from a road. He testified that he took the ankle monitor to his office, where he verified it was the one assigned to and installed on defendant.

Defendant did not present any evidence.

On 16 May 2017, the jury found defendant guilty of interfering with an electronic monitoring device.

On 17 May 2017, the habitual felon phase of the trial began. The indictment charged defendant with habitual felon status based on three convictions in McDowell County: a 4 June 2001 conviction for felonious breaking and entering on or about 20 February 2001, a 18 February 2010 conviction for felonious breaking and entering on or about 29 October 2009, and a 22 July 2014 conviction for safecracking on or about 27 June 2013. The State offered true copies of judgments related to the 18 February 2010 and 22 July 2014 convictions as evidence.

As proof of the 4 June 2001 conviction, the State called the Clerk of McDowell County Superior Court, Melissa Adams, as a witness. She identified a printout of a record entered into the Automated Criminal/Infraction System ("ACIS") that showed that, on 4 June 2001, defendant was convicted in McDowell County case 01 CR 1216 of felony breaking and entering for an offense that occurred on 20 February 2001. Defendant objected to the submission of the ACIS printout, arguing it was not the best evidence in this case because it was not a copy of the judgment. The trial court overruled defendant's objection, explaining: "ACIS is a way in which the State can introduce true copies of judgments entered in the system, and it's admissible under the rules of evidence."

The jury found defendant had attained habitual felon status. The trial court sentenced defendant to an active term of incarceration for 38 to 58 months.

Defendant appeals.

II. Discussion

Defendant makes two arguments on appeal. First, he argues the trial court committed plain error by admitting hearsay evidence to establish that the ankle monitor found in the ditch was the monitor assigned to

defendant. Second, he argues the trial court erred when it allowed an ACIS printout into evidence as proof of defendant's 2 June 2001 conviction for felony breaking and entering. We address each argument in turn.

A. Hearsay Evidence

[1] Defendant argues the trial court plainly erred when it allowed Officer Ashe to provide testimony based on GPS tracking evidence and simultaneously prepared reports to establish that the ankle monitor that he found was the same monitor that had been installed on and assigned to defendant. Defendant contends this testimony constituted hearsay that was not admissible under any exception. We disagree.

Officer Ashe testified that the 24 September 2015 alert he received from BI Total Monitoring identified defendant as the probationer to whom the monitor at issue was assigned. Defendant objected to this statement as hearsay, but was overruled. Subsequently, Officer Ashe testified that he verified the monitor was the one assigned to and installed on defendant. Defendant did not object. Therefore, he lost the benefit of his initial objection and failed to preserve this issue for appellate review. *See State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984) ("[W]hen . . . evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.") (citations omitted). Nonetheless, defendant contends the admission of Officer Ashe's testimony based on GPS tracking evidence and simultaneously prepared reports amounts to plain error.

Under plain error review, an issue that was not preserved "may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2018). "[P]lain error review . . . is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted). To show plain error, a "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Accordingly, the error must have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and internal quotation marks omitted).

Rule 801 of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). Hearsay is generally not admissible at trial, unless otherwise allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802. Rule 803(6) of the North Carolina Rules of Evidence establishes an exception to the general exclusion of hearsay for business records, which the rules define as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity, and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6). Electronically stored business records are admissible if:

> (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Jackson, 229 N.C. App. 644, 650, 748 S.E.2d 50, 55 (2013) (quoting *State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011)). These records need not be authenticated by the person who made them. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted).

Our Court has previously held that hearsay statements based on "GPS tracking evidence and simultaneously prepared reports are admissible under the business records exception to the hearsay rule." *State v. Gardner*, 237 N.C. App. 496, 499, 769 S.E.2d 196, 198 (2014) (citation omitted). However, defendant argues that the testimony at issue does not meet the requirements of the business records exception because the probation officers that testified did not lay a proper foundation "to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy" as required under our caselaw. We disagree.

In both *Gardner* and *Jackson*, we held that the probation officers' testimony was sufficient to lay a proper foundation for statements based on GPS tracking evidence and simultaneously prepared reports. *Id.* at 501, 769 S.E.2d at 199; *Jackson*, 229 N.C. App. at 650-51, 748 S.E.2d at 55-56. Here, as in *Gardner*, one of the probation officers that testified, Officer Plaster, testified concerning the operation of the electronic monitoring device worn by defendant and demonstrated his familiarity with the system through his testimony. Additionally, he testified that the information transmitted through the GPS technology is stored in a software database that the probation office uses to conduct its business. He also testified that the program is an accurate source of information that "works really well." We hold that his testimony established a sufficient foundation of trustworthiness for the tracking evidence to be admissible as a business record. Therefore, the trial court did not err when it permitted Officer Ashe to testify that the tracking data in this case verified that the ankle monitor at issue had been assigned to defendant. Because the trial court did not err, the trial court did not commit plain error.

B. Evidentiary Requirements Under N.C. Gen. Stat. § 14-7.4

[2] Defendant argues the trial court erred when it allowed an ACIS printout to be admitted as proof of a prior conviction to establish defendant's habitual felon status. Specifically, he argues the admission of the printout violated the best evidence rule, which requires secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available. *See State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997) (citing N.C. Gen. Stat. § 8C-1, Rules 1002-1004 (2017)).

While this Court has previously concluded, in an unpublished opinion, that criminal history printouts from the ACIS database were admissible evidence to prove a prior felony under N.C. Gen. Stat. § 14-7.4, see *State v. Aultman*, No. COA15-242, __ N.C. App. __, __, 781 S.E.2d 532,

__, 2016 WL 47970 at *6 (N.C. Ct. App. Jan. 5, 2016) (unpublished), it is well settled that "[a]n unpublished opinion establishes no precedent and is not binding authority[.]" *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (citation, internal quotation marks, and brackets omitted). Nonetheless, we agree with the reasoning set out in *Aultman* and hold that printouts from the ACIS database were admissible evidence to prove a prior felony under N.C. Gen. Stat. § 14-7.4, and, thus, were not barred by the best evidence rule, for the reasons that follow.

Under the Habitual Felon Act ("the Act"), "when a defendant has previously been convicted of or pled guilty to three non-overlapping felonies," and commits a new felony under North Carolina law, the "defendant may be indicted by the State in a separate bill of indictment for having attained the status of being an habitual felon." *State v. Wells*, 196 N.C. App. 498, 502, 675 S.E.2d 85, 88 (2009) (citation omitted); N.C. Gen. Stat. § 14-7.1 (2017). "The trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (citing N.C. Gen. Stat. § 14-7.5). "Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon." *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988) (citing N.C. Gen. Stat. § 14-7.6) (citation omitted).

The Act sets out the following evidentiary requirements for proving prior felonies:

> In all cases where a person is charged . . . with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.

N.C. Gen. Stat. § 14-7.4. A "certified copy" under N.C. Gen. Stat. § 14-7.4 is "a copy of a document or record, signed and certified as a true copy by the officer whose custody the original is [entrusted]." *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913 (2002) (citing Black's Law Dictionary 228 (6th ed. 1990)) (emphasis and alteration omitted). There is no recognizable distinction between certified copies and true copies. *Id.* "[A]lthough section 14-7.4 contemplates the most appropriate means to prove prior convictions for the purpose of establishing habitual felon status, it does not exclude other methods of proof." *State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000) (citation omitted).

Our Supreme Court has explained ACIS is:

> an electronic compilation of all criminal records in North Carolina. While the North Carolina Administrative Office of the Courts (AOC) administers and maintains ACIS, the information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk. Any subsequent modifications to that information are under the exclusive control of the office of the Clerk that initially entered the information, so that personnel in one Clerk's office cannot change records entered into ACIS by personnel in a different Clerk's office. In other words, the information in ACIS both duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court.

LexisNexis Risk Data Mgmt. Inc. v. North Carolina Administrative Office of Courts, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015). In a case not involving the Habitual Felon Act, our court held that a "printed-out email, which contains a screenshot of the AOC record of the conviction, is 'a copy' of a 'record maintained electronically' by the Administrative Office of the Courts, which is sufficient to prove [a] prior conviction under N.C. Gen. Stat. § 15A-1340.14(f)(3)" to determine prior record level for sentencing. *State v. Best*, 202 N.C. App. 753, 757, 690 S.E.2d 58, 61 (2010).

In the instant case, the ACIS printout was sufficient evidentiary proof of defendant's 4 June 2001 conviction under the Habitual Felon Act. ACIS "duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by" clerks of court. *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652. The Clerk of McDowell County Superior Court, the individual tasked with maintaining the physical court records in McDowell County, testified that the printout was a certified true copy of the information in ACIS regarding this judgment. She also explained the information was "the same as the judgment" and affirmed it "is a different way of recording what's on a judgment[.]" The Clerk's certification of the ACIS printout as a true copy of the original information is significant due to her responsibility and control over the physical court records, copies, and ACIS entries, as described in *LexisNexis Risk Data Mgmt. Inc.*

The Best Evidence Rule does not bar the admission of this ACIS printout merely because the original judgment was unaccounted for at trial. The plain reading of N.C. Gen. Stat. § 14-7.4 and our habitual felon jurisprudence makes clear that the statute is permissive and does not exclude methods of proof that are not specifically delineated in the Act. *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695 (citation omitted). Moreover, the Clerk of McDowell County Superior Court certified the information as a true copy. The trial court did not err by permitting the State to offer the ACIS printout as evidence of the 4 June 2001 conviction.

III. Conclusion

For the forgoing reasons we hold the trial court did not commit error.

NO ERROR.

Judge CALABRIA concurs.

Judge MURPHY concurs in part and dissents in part in a separate opinion.

Murphy, Judge, concurring in part and dissenting in part.

I concur with the Majority opinion as to the conviction of interfering with an electronic monitoring device, but must respectfully dissent as to the conviction of habitual felon status. State's Exhibit 4, the Automated Criminal/Infraction System (ACIS) printout used to prove one of Defendant's three convictions, was not admissible because the State did not sufficiently comply with the foundational requirements of the best evidence rule.

Under N.C. Gen. Stat. § 14-7.4, "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the *court record* of the prior conviction." N.C. Gen. Stat. § 14-7.4 (2017) (emphasis added). While the habitual felon statutory language is "permissive," *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695, "[t]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence." *State v. Blakney*, 233 N.C. App. 516, 521, 756 S.E.2d 844, 848 (2014) (alteration omitted) (quoting *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984)). Thus, although N.C. Gen. Stat. § 14-7.4 "does not exclude other methods of proof[,]" *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695, I dissent because the Majority extends the "permissive" nature of N.C. Gen. Stat. § 14-7.4 too far and suspends

the applicability of our Supreme Court precedent and the Rules of Evidence to habitual felon proceedings.

I note that a printout from the ACIS is neither a "court" nor "judicial" record of a criminal conviction. Rather, the ACIS "is an electronic compilation of all criminal records in North Carolina." *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652. Thus, an ACIS printout is actually a record of the data stored in the ACIS database at one point in time, not a court record. *See id.* Our Supreme Court has held that "[t]he proceedings of courts of record can be proved by their records only[.]" *Jones v. Jones*, 241 N.C. 291, 293, 85 S.E.2d 156, 158 (1954) ("Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth."). This historic mandate is consistent with the modern statutory language of N.C. Gen. Stat. § 14-7.4, which provides that "[a] prior conviction may be proved by the original or a certified copy of the court record of the prior conviction." Therefore, this precedent has not been superseded by statute and is still applicable in the instant case. Our precedent prefers that the proceedings of Courts, such as a criminal conviction, be proved by "their records." Notwithstanding this critical distinction between a judgment record and an ACIS printout, I agree that an ACIS printout may serve as secondary evidence of a defendant's record of conviction, provided that the requirements of the best evidence rule are satisfied. Here, they were not.

Wall, a case principally relied upon by the Majority, is distinguishable from the instant case. In *Wall*, we determined whether "*a faxed certified copy of a criminal record* is admissible under section 14-7.4 to prove defendant's status as an habitual felon." *Wall*, 141 N.C. App. at 532, 539 S.E.2d at 694 (emphasis added). There, although the State did not submit the original or a certified copy of the court record of the defendant's prior felony conviction, the State still proved his conviction with a "court record." *Id.* at 530, 539 S.E.2d at 693. It was with a faxed version of the certified copy of the judgment and commitment form, not an ACIS printout. *Id. Wall*'s holding, confined to its facts, is fairly simple: a facsimile of a certified copy of a defendant's judgment and commitment form is permitted under N.C. Gen. Stat. § 14-7.4. *Id.* at 533, 539 S.E.2d at 695. This distinction between *Wall* and the instant case further confirms that despite N.C. Gen. Stat. § 14-7.4's permissive nature, the State must either proffer a "court record" or otherwise comply with the best evidence rule.

Further, although bound by *Wall*, I dissent in part to recognize that we provided an incomplete and truncated interpretation of N.C. Gen.

Stat. § 14-7.4 in that case. *Id.* at 531-32, 539 S.E.2d at 694. Specifically, *Wall*'s interpretation of N.C. Gen. Stat. § 14-7.4 omits critical words of the statute, and as a result ignores legislative intent. *Id. Wall* stated that:

> The statute at issue in the instant case, section 14-7.4, clearly indicates that the provision is permissive, not mandatory, in that it provides a prior conviction "may" be proven by stipulation or a certified copy of *a record*.

Id. at 533, 539 S.E.2d at 695 (emphasis added). However, the plain language of N.C. Gen. Stat. § 14-7.4 does not provide that a prior conviction may be proven by any "copy of a record," as the above language from *Wall* suggests. *Id.* Rather, N.C. Gen. Stat. § 14-7.4 expressly states that a copy of "the court record" of the prior conviction may be used:

> A prior conviction may be proved by . . . the original or a certified copy of *the court record* of the prior conviction.

N.C. Gen. Stat. § 14-7.4 (emphasis added). A "certified copy of *the court record*" is not synonymous with a "certified copy of *a record*." *Compare id. with Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695.

State v. Aultman, an unpublished decision of this Court, whose reasoning is adopted by the Majority today, relied on *Wall's* truncated interpretation of N.C. Gen. Stat. § 14-7.4. *See Aultman*, 2016 WL 47970 at *5 (unpublished) (citing *Wall*, 141 N.C. App. at 531-32, 539 S.E.2d at 694). Unlike the Majority and the unpublished opinion in *Aultman*, I would limit the holding of *Wall* to its facts, and would decline to extend its reasoning to permit the introduction of ACIS printouts as secondary evidence of a criminal defendant's judgment record without first complying with the foundational requirements of the best evidence rule. *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695 (holding that a faxed copy of a certified copy of the actual judgment can be admitted to prove a prior conviction in a habitual felon proceeding).

I note that at trial, Defendant argued that the ACIS printout should have been barred by the best evidence rule. Defendant also advances this argument on appeal. However, in neither *Wall* nor *Aultman* did the defendant make any argument concerning the best evidence rule. *Wall*, 141 N.C. App. 529, 539 S.E.2d 692; *Aultman*, 2016 WL 47970. Thus, neither of these cases should be deemed controlling in our resolution of the present case.

The best evidence rule applies here because the ACIS printout was admitted to prove the contents of a judicial record (i.e. a "writing") that the State indicated was unavailable. In response to Defendant's

objection, the State admitted that they had originally intended to use Defendant's judgment and commitment record to prove his conviction, but were using the ACIS printout (submitted as State's Exhibit 4) because the original could not be found.

> *The State*: I'll tell you Your Honor that when we were gathering these documents, 4A had come from microfilming and they said that they didn't have the original of 4. So 4 is the record of the original judgment.

However, this explanation by the State fails to lay the proper foundation necessary to admit secondary evidence of public records under North Carolina Rule of Evidence 1005. I again emphasize that an ACIS printout is not a court record of the original judgment, but is only secondary evidence thereof. *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652. The information contained in the ACIS database is entirely dependent upon the contents of a physical court record, a signed judgment and commitment form. *Id.* ("[T]he information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk.").

As Defendant's 4 June 2001 judgment record is a "public record," the admissibility of an ACIS printout as secondary evidence of it is governed by Rule 1005. Thus, to properly admit the ACIS printout, the State was required to establish that a copy of the 4 June 2001 judgment record could not be "obtained by the exercise of reasonable diligence." N.C. Gen. Stat. § 8C-1, Rule 1005 ("If a copy which complies with the foregoing cannot be obtained by the exercise of *reasonable diligence*, then other evidence of the contents may be given." (emphasis added)).

Here, there was an inadequate foundation regarding the State's exercise of "reasonable diligence" to obtain a copy of the 4 June 2001 judgment record. *Id.* The only statement made by the State regarding the unavailability of Defendant's judgment record is simply that "they didn't have the original[.]" As to the degree of diligence required under Rule 1005, reasonable diligence "is not easy to define, as each case depends much on its peculiar circumstances[.]" *Avery v. Stewart*, 134 N.C. 287, 290, 46 S.E. 519, 520 (1904). However, reasonable diligence is not an insurmountable standard, even in this context where the State has the burden to prove a defendant guilty beyond a reasonable doubt:

> What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of

> the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the Court and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. . . . [T]he burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence. He must establish its loss by proof that he has made diligent but unavailing search for the paper in places where it would be most likely to be found, and the degree of diligence necessary to be shown must depend upon the value and importance of the lost document.

Id. (internal quotation marks and citations omitted).

The prosecutor's statement that "they said that they didn't have the original" is not competent evidence of reasonable diligence under Rule 1005. I recognize that the admissibility of secondary evidence of a public record under Rule 1005 is a preliminary question, and the trial court, in making its determination on the question of admissibility, is not bound by the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 104(a). However, our precedent does not treat the statements of counsel to be "evidence." *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) ("Our review of representative cases discloses no circumstances where statements of counsel have been treated as evidence[.]"). In *Crouch*, we recognized that the Rules of Evidence do not apply at probation revocation hearings yet still concluded that the defendant was required to present "competent evidence" of his inability to comply with the terms of his probation to meet his burden. *Id.* at 567, 328 S.E.2d at 835. We held that statements from the defendant's counsel were not competent evidence. *Id.* Similarly, in the instant case, although Rule 104 allowed for a relaxation of the Rules of Evidence in determining the preliminary matter of diligence, the State was still required to present evidence. The prosecutor's statement that "they didn't have the original" is not evidence.

Assuming *arguendo* that the statements of counsel are competent evidence for a Rule 1005 foundation, the statement "they said that they didn't have the original" fails to evince a reasonably diligent search. We are unable to discern who they are, where they looked for Defendant's judgment record, and why they did not have an original or a copy of the record. Thus, we have no way of discerning whether a good faith search

has been made in a place where the judgment record was most likely to be found. Even in our unpublished and nonbinding decision in *Aultman*, the ACIS report was only admitted after the Assistant Clerk of Court for the criminal division of Duplin County testified that the ACIS reports were "the only records that would be left of the district court files."[1] *Aultman*, 2016 WL 47970 at *3. Here there was no such testimony, and although the Clerk of McDowell Superior Court testified at Defendant's habitual felon trial, she only testified as to what an ACIS printout was generally and to the meaning of the abbreviations in the ACIS report fields.

By ignoring the applicability of the best evidence rule, the Majority implicitly endorses a subminimal foundation standard that impedes our ability to conduct effective and efficient appellate review. Moreover, the Majority's opinion is a departure from our precedent because it suggests that the evidence necessary to establish a Rule 1005 "reasonable diligence" foundation can come solely from the statements of counsel who seek to admit evidence of the contents of a public record against the other party. Our precedent dictates that ACIS printouts should be used out of necessity, not choice. *See Wall*, 141 N.C. App. 531, 539 S.E.2d 693 (facsimile of judgment); *State v. Ross*, 207 N.C. App. 379, 400, 700 S.E.2d 412, 426 (2010) ("Although other documents, such as a transcript of plea, could be used to prove a conviction, we agree that, as our Supreme Court stated, the '*preferred method* for proving a prior conviction includes the introduction of the judgment itself into evidence.' " (quoting *Maynard*, 311 N.C. at 26, 316 S.E.2d at 211)). The Rules of Evidence and in turn, the best evidence rule apply during the habitual felon enhancement stage of a trial. As the State failed to present competent evidence necessary to establish a foundation demonstrating that a reasonably diligent search was conducted to locate Defendant's 4 June 2001 judgment record, I must respectfully dissent.

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1. I note that the foundation laid by the Duplin County Clerk in *Aultman* further indicated that the ACIS printout was the only remaining evidence of the defendant's conviction. Specifically, ACIS printouts contain a data field labeled "FILM" and this field denotes whether a particular conviction record has been archived via microfilming. In *Aultman*, the "FILM" field in the ACIS printout indicated that the District Court's judgment record was never microfilmed. In contrast, here the "FILM" field in Defendant's ACIS printout contains a corresponding microfilm number, confirming that his original 4 June 2001 judgment record has been archived via microfilming. As a result, the State needed to do more to lay a foundation of a reasonably diligent search for this record.

STATE OF NORTH CAROLINA
v.
JASEN WILSON, DEFENDANT

No. COA17-1317

Filed 7 August 2018

1. Sexual Offenses—by a person in a parental role—sexual act

The State presented sufficient evidence to convict defendant of sex offenses against his 16-year-old stepdaughter. The testimony of an officer recounting defendant's confession, in which he stated he put his hands "in" his stepdaughter's genital area, would allow a rational juror to conclude that defendant engaged in the sexual act of digital penetration of his stepdaughter in violation of N.C.G.S. § 14-27.7.

2. Sexual Offenses—opinion testimony—female anatomy—plain error review

The trial court did not plainly err in a prosecution for sex offenses by allowing an officer to give his "opinion" concerning the female anatomy and his inference that digital penetration occurred. Absent this testimony, there was sufficient other evidence of penetration.

Appeal by Defendant from judgment entered 20 July 2017 by Judge Richard Kent Harrell in Onslow County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Larissa S. Williamson, for the State.

Leslie Rawls for the Defendant.

DILLON, Judge.

Jasen Wilson ("Defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of sex offenses by a person in a parental role. Based on our careful review of the record and of controlling precedent, we conclude that Defendant has failed to demonstrate reversible error.

I. Background

This case arises out of alleged sexual conduct by a stepfather with his then 16-year-old stepdaughter. The evidence at trial tended to show the following:

In 2006, Defendant married and became the stepfather of his new wife's young daughter, Fiona.[1] Fiona had never met her birth father, and Fiona grew up knowing Defendant as her father.

Years later, in September 2015, when Fiona was 16 years old, Fiona reported to her high school resource officer that Defendant had "touched her inappropriately" over the past couple of months. Fiona told an investigator that Defendant had digitally penetrated her vagina. Defendant ultimately admitted to a police officer that he touched Fiona in inappropriate ways, but he maintained that he had never digitally penetrated her.

Defendant was indicted on five counts of sexual activity by a substitute parent. At trial, Fiona recanted what she had previously told the investigator. The officer who had interviewed Defendant, though, testified to what Defendant had confessed to him. The jury found Defendant guilty of two of the five counts of sexual activity by a substitute parent. Defendant timely appealed.

II. Analysis

Defendant's appeal focuses on the current state of the law that the State's burden at trial was to show that Defendant *penetrated* Fiona's genitalia with his fingers, not that he merely touched her genitalia. Specifically, Defendant was convicted of two counts of violating N.C. Gen. Stat. § 14-27.7 (2014).[2]

To prove a violation of Section 14-27.7, the State must prove that (1) the accused had assumed the position of a parent in the home of a minor victim[3] and (2) that he engaged in a "sexual act" with the minor residing in the home. *Id.*

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1. A pseudonym.

2. This statute has been re-codified to N.C. Gen. Stat. § 14-27.31 (2015). Because the events at issue occurred prior to 1 December 2015, we reference the prior citation.

3. Defendant does not challenge on appeal that the State's evidence at trial was sufficient to establish that he had assumed the role of Fiona's parent.

The term "sexual act" as defined by our General Assembly does not cover every manner of sexual contact. That is, not every sexual *contact* rises to the level of a sexual *act*. Indeed, our General Assembly has defined "sexual *contact*" more broadly, in relevant part, as the mere touching of a "sexual organ, anus, breast, groin or buttocks[,]"[4] whereas our General Assembly has defined "sexual *act*" more narrowly, in relevant part, as "the *penetration*, however slight, by an object into the genital" opening. N.C. Gen. Stat. § 14-27.1 (2014) (emphasis added).

Accordingly, based on evidence which shows that Defendant had his hands in Fiona's genital area, the State had the burden to prove that Defendant actually digitally penetrated Fiona to establish that Defendant violated Section 14-27.7. Merely touching her genitals is not enough.[5]

Defendant makes two arguments on appeal, each of which focuses on the trial testimony of the officer who had interviewed Defendant. We address each argument in turn.

A. Denial of Defendant's Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss, contending that the State failed to offer any competent evidence to show that Defendant penetrated Fiona's genitalia.

Our standard of review is to determine whether the evidence, taken in the light most favorable to the State and giving the State the benefit of

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4. This statute was re-codified to N.C. Gen. Stat. § 14-27-20 in 2015.

5. Any sexual contact by Defendant with Fiona, a minor of whom he had assumed the position of a parent, may seem morally reprehensible. But all the evidence at trial showed that Fiona had reached the age of 16 when her alleged encounters with Defendant occurred. In North Carolina, the "age of consent" is 16. Therefore, assuming that Fiona lawfully consented to these encounters with her stepfather, any act of touching her genital area for his sexual gratification is not a crime under our statutes criminalizing indecent liberties with a child, N.C. Gen. Stat. § 14-202.1 (2015) (stating the victim must be under 16 years of age). Our Supreme Court has recognized that one can be guilty of a crime against nature pursuant to N.C. Gen. Stat. § 14-177 for a sexual encounter with a victim under 18, *see State v. Hunt*, 365 N.C. 432, 440, 722 S.E.2d 484, 490 (2012); however, our Supreme Court has also held that "penetration" is a required element of a crime against nature, *see State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (holding that "not every act of sexual perversion is encompassed within the definition of 'the crime against nature' . . . . The crime . . . is not complete without penetration, however slight . . . ."). Our General Assembly has only criminalized consensual sexual encounters between a stepfather who has assumed the role of a parent and his minor stepdaughter who has reached her sixteenth birthday and is living under his roof where the encounters rise to the level of a "sexual *act*" as defined by our General Assembly. Mere "sexual *contact*," even if done for the stepfather's sexual gratification, is not enough, so long as the sixteen-year old stepdaughter lawfully consents.

all reasonable inferences, could persuade a rational juror that Defendant, in fact, penetrated (and not merely touched) Fiona's genitalia with his finger. *See State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842-83 (2011). If all reasonable inferences of such evidence merely "raise a suspicion or conjecture" that Defendant penetrated Fiona's genitalia, then it was the trial court's duty to allow Defendant's motion to dismiss. *See State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

Here, the only substantive, competent evidence offered by the State at trial in its attempt to show that Defendant penetrated Fiona was through the testimony of the officer who recounted what Defendant confessed to him.[6] This officer testified that Defendant confessed to putting his hands "in [Fiona's] genital area" with her consent, which caused her to become sexually aroused:

> A. [Officer describing that Defendant confessed that he and Fiona] would spoon, watching [TV.] At times, she would put my hands in her genital area, and I would pull my hand back and she would put it back there. And then I realized it's something she wanted to feel, so I would let her experience that. She felt safe with me. She felt comfortable with me. So there were times that she put my hand in her pants.
>
> [Officer then described his] line of questioning [that] went, was she excited about it, was it something she wanted? And that's when [Defendant] talked about her actually being wet and he could feel that, on a couple of occasions, but it was something that she wanted. . . . [He] went on to talk about it occurring more, you know, other times it had occurred.
>
> Q. So he indicated to you that this happened on several occasions, is that correct?
>
> A. Yes, ma'am.
>
> * * * *
>
> Q. Did [Defendant] indicate, even though he called her the aggressor, did he indicate that he participated in the act?

6. Statements of a defendant are admissible as exceptions to hearsay under rule 801(d) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-801(d) (2015).

> A. Well, yes. He said that, you know, whenever she wanted – what he described as that he did not want her to experience this anywhere else. He – because she felt safe with him, he wanted her to experience it with him. He felt like that it was something that she was exploring. He didn't want to stifle that exploration. He wanted her to be able to feel these things.

We conclude that a rational juror, hearing this description of Defendant being "in" Fiona's genital area, wanting her to experience sexual stimulation by his touch, feeling that she was "wet," and feeling that she was sexually stimulated by his touch, could reasonably infer that Defendant at least penetrated Fiona's labia, notwithstanding that a rational juror could reasonably infer otherwise. *See*, *e.g.*, *State v. Walston*, 367 N.C. 721, 729, 766 S.E.2d 312, 318 (2014) (holding that "[t]he entering of the labia is sufficient to establish [penetration]"). We note Defendant's statement to the officer denying penetrating Fiona, but we are to disregard this and other evidence unfavorable to the State in considering the sufficiency of the State's evidence. *Hill*, 365 N.C. at 275, 715 S.E.2d at 842-83.

We also note that in *State v. Whittemore* our Supreme Court held that testimony that the accused told the alleged victim to pull her pants down and then proceeded to "put his hand on [her] privates" for "two or three minutes," then "put his mouth . . . on [her] privates" for about "one or two minutes," and then "[rubbed] his privates at [her] privates rubbing it up and down" was insufficient to prove that any penetration had occurred. *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398. By contrast, the facts of the present case raise more than a mere suspicion or conjecture that penetration occurred. Though the evidence does not conclusively establish penetration, we conclude that a juror could reasonably infer that penetration occurred.

B. Plain Error

[2] Defendant argues that the trial court plainly erred by allowing the officer to give his "opinion" that (quoting Defendant's brief) "the secretions a woman emitted during sexual arousal can only be detected by vaginal penetration" and that, based on Defendant's confession, the fact that Defendant could feel that Fiona was "wet" in her genital area means penetration must have occurred:

> Q. And the specific sexual act that you were talking about, how would you characterize that? What sexual act was being committed, according to what he was saying?

> A. At that point, I would think he had his hands in his (sic) pants and he was digitally penetrating her. That would be the sexual act I would be thinking about, or talking about. If he could feel [her being wet], that would lead me to believe he had to do it.

Also, on cross-examination, the officer agreed that "you cannot feel the wetness unless your finger is inside the vagina[.]"

In order to properly preserve an evidentiary error for appellate review, the appealing party must have objected at trial. *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). If the appealing party fails to object at the appropriate time, our review is limited to plain error. *Id.* at 660, 300 S.E.2d at 378. Under plain error review, we first "must determine that an error occurred at trial." *State v. Miller*, ___ N.C. ___, ___, 814 S.E.2d 81, 83 (2018). If we determine that the "judicial action questioned amounted to error," *see* N.C. R. App. P. 10(a)(4), then we must determine whether, absent that error, the jury would have probably reached a different result. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Here, Defendant did not object to the officer's testimony. Therefore, we review for plain error. Assuming that the trial court erred by not striking the testimony, we conclude that such error did not rise to the level of plain error. Absent the officer's "opinion" concerning female anatomy, there was sufficient competent evidence for the jury to conclude that Defendant had penetrated Fiona, as set forth in the previous section of this opinion. Defendant has identified no evidence or argument presented at trial indicating that the jury was led to believe that the officer's knowledge of female anatomy exceeded the knowledge of that of the jurors. Accordingly, we do not believe that it is reasonably probable that the jury was swayed by the officer's "opinion" regarding female anatomy such that it would have reached a different result had his "opinion" not been before the jury.

NO ERROR.

Judges DAVIS and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 AUGUST 2018)

AWARTANI v. MOSES H. CONE MEM'L HOSP. OPERATING CORP. No. 17-1300	Guilford (17CVS3061)	Affirmed
BEASLEY v. BEASLEY No. 18-47	Forsyth (15CVD5916)	Affirmed
BUS. IMPROVEMENT TECHS., INC. v. WORLD FAMOUS, INC. No. 17-1274	Wake (16CVD13635)	Affirmed
BYBEE v. ISLAND HAVEN, INC. No. 17-859	Currituck (15CVS386)	Affirmed in part, reversed in part, and remanded with instructions
CARUTHERS v. HANN No. 17-1381	Mecklenburg (99CVD6562)	Vacated and Remanded
DM TR., LLC v. McCABE & CO. No. 17-1193	Carteret (16CVS841)	Affirmed
GERSING v. REAL VISION, INC. No. 17-1382	Avery (15CVS298)	Affirmed
GRODNER v. GRODNER No. 17-570	Pitt (13CVD398)	Affirmed in part; dismissed in part
GRODNER v. GRODNER No. 17-813	Pitt (13CVD398)	Affirmed in part; dismissed in part
HARDY v. N.C. CENT. UNIV. No. 17-664	Office of Admin. Hearings (16OSP4632)	Affirmed
HENION v. CTY. OF WATAUGA No. 17-1107	Watauga (16CVS204)	Dismissed
IN RE B.V. No. 18-84	Mecklenburg (15JT534) (15JT553) (15JT674)	Affirmed
IN RE C.R.R. No. 18-11	New Hanover (15JT167) (15JT168)	Affirmed

IN RE C.W-J.H. No. 18-187	Guilford (15JT450-51) (15JT453-54)	Affirmed
IN RE COGGINS No. 17-1275	Property Tax Commission (17PTC22) (17PTC23) (17PTC24) (17PTC25) (17PTC26)	Affirmed
IN RE FORECLOSURE OF BYRD No. 17-1150	Guilford (16SP1235)	Affirmed
IN RE FORECLOSURE OF SMITH No. 17-874	Gaston (16CVS3443)	Dismissed
IN RE G.L.H. No. 17-1406	Cabarrus (17JT12)	Affirmed
IN RE I.M.P. No. 18-256	Iredell (14JT130) (14JT131)	AFFIRMED IN PART; VACATED IN PART; AND REMANDED.
IN RE K.S.C. No. 18-196	Gates (17JT1)	Vacated and Remanded
IN RE L.A.G. No. 18-283	Forsyth (15JT288)	Vacated and Remanded
IN RE M.V. No. 18-128	Mecklenburg (15JT660-661)	Affirmed
IN RE T.S.B.-S. No. 17-1343	Johnston (13JT64) (13JT65) (13JT89)	Affirmed
JONES v. WELLS FARGO CO. No. 18-96	Nash (15CVS950)	Affirmed
KOVASALA v. KOVASALA No. 17-1084	Wake (12CVD12875)	Affirmed in part, Vacated and Remanded in Part
LANE v. GRAFTON No. 17-1003	Durham (15CVS3869)	Affirmed

LASSITER v. KEYSTONE FREIGHT CORP. No. 17-881	N.C. Industrial Commission (X27940) (X68504)	Affirmed
NEWTON v. GARIEPY No. 17-1175	Durham (15CVD5703)	Affirmed
PHIFER v. PASQUOTANK CTY. No. 17-1155	Pasquotank (15CVS531)	Reversed and Remanded
STATE v. BARNETTE No. 17-1082	Cabarrus (12CRSS53279) (12IFS707275)	Affirmed
STATE v. BECKER No. 17-1311	Swain (15CRS50416)	No Error
STATE v. BELK No. 17-1331	Mecklenburg (15CRS217713) (15CRS217715) (15CRS217717) (15CRS218746-47)	No Error
STATE v. BLACK No. 17-963	Cumberland (14CRS57611)	Dismissed
STATE v. BROWN No. 17-1062	Bladen (14CRS51698) (14CRS51702) (16CRS999)	No Error
STATE v. CHEEK No. 17-829	Randolph (01CRS56902)	Affirmed
STATE v. FERGUSON No. 17-764	Johnston (15CRS2221-2222)	No Error
STATE v. FOOR No. 17-1316	Durham (16CRS51289)	NO PREJUDICIAL ERROR AT TRIAL; REMANDED FOR NEW RESTITUTION HEARING.
STATE v. GARCIA No. 17-912	Haywood (16CRS50695-96) (16CRS50698-99)	Affirmed
STATE v. HARVEY No. 17-1246	Edgecombe (15CRS52194)	No Error

STATE v. HAYWOOD No. 18-85	Ashe (17CRS50022)	No Error
STATE v. McLEOD No. 17-1029	Vance (14CRS53551)	No Error
STATE v. MELGAREJO No. 17-1030	Alamance (15CRS52242)	No Error
STATE v. MILLER No. 17-1215	Union (12CRS53800)	Reversed
STATE v. MOORE No. 18-75	Johnston (16CRS1495-96)	No Error
STATE v. NARANJO No. 17-742	Wake (11CRS100) (11CRS211149)	Affirmed
STATE v. PLESS No. 17-1270	Iredell (12CRS56462-63) (12CRS56466)	No Error
STATE v. REAVES No. 18-100	Columbus (13CRS50034)	No Error
STATE v. SMITH No. 17-1184	Cleveland (14CRS53429)	NO PREJUDICIAL ERROR.
STATE v. SPRINGLE No. 17-652	Carteret (13CRS54303)	Dismissed
STATE v. THOMAS No. 17-904	Davidson (11CRS5349) (11CRS53949)	Affirmed
STATE v. UPCHURCH No. 17-1372	Wake (15CRS202498) (15CRS202500) (15CRS202504)	Affirmed
STATE v. VICKERS No. 17-1216	Wake (14CRS211534)	Affirmed
STATE v. WILLIAMS No. 17-913	Edgecombe (14CRS53269) (15CRS1140)	No Error in part; Vacated and Remanded in part.

STATE v. YOUNG No. 18-258	Mecklenburg (16CRS14131-32)	No Error
TRACTOR PLACE, INC. v. BOLTON No. 17-878	Wake (16CVD578)	Affirmed

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